



The Construction of Fatherhood under the Jurisprudence of the European Court of Human Rights

Alice Margaria

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Examining Board

Prof. Ruth Rubio-Marin, European University Institute (Supervisor)
Prof. Bruno de Witte, European University Institute
Prof. Oddný Mjöll Arnardóttir, University of Iceland
Ms Shazia Choudhry, Queen Mary University of London

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This thesis has been submitted for language correction.

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Abstract

Over the last fifty years, a series of demographic and sociological shifts have resulted in an increasing split of biological families into different households, marriages and cohabitations. This process of disaggregation has proved to be a profoundly gendered phenomenon: it signified and continues to signify, to a great extent, a fragmentation of fatherhood. *Vis-à-vis* current family realities, this thesis attempts to establish to what extent the European Court of Human Rights deviates from or replicates the model of ‘conventional fatherhood’ when determining whether the refusal to grant the status of legal father or parental rights to the applicant amounts to a violation of his right to respect for family life (Article 8 ECHR), taken alone or in conjunction with Article 14 ECHR. For present purposes, ‘conventional fatherhood’ presupposes the coexistence of the following features within the same individual: a biological link between the father and his child, a marital relationship with the child’s mother, economic provision, heterosexuality and, more generally, compliance with heteronormative standards.

The jurisprudential analysis points to, at least, four main findings. Firstly, rather than abandoning a conventional understanding of fatherhood, the Court tends to simply add a new layer to it: the father’s interest and commitment to the child. However, this combination of change and continuity and, more specifically, the increased importance attached to nurturing bear a partial exception: the definition of fatherhood and, more generally, of parenthood endorsed in the jurisprudence pertaining to homo-parenthood. Secondly, the reaction of the Court to the realities of fragmented fatherhood is changeable. In decisions concerning the award of parental rights, the Court overcomes the assumption of exclusivity more easily, provided that the coexistence of more than one paternal figure serves the child’s best interests. Differently, when it is the full legal status of fatherhood that is under scrutiny, the Court attempts to maintain the paternal figure as compact as possible, in line with the conventional ideology of fatherhood. Thirdly, the Court has proved generally cautious to impose new legal conditions at the national level; therefore, it seems to understand the role of the Convention as being that of reflecting – more than transforming – national legal realities. At the same time, although to a limited extent, the Court has begun to adopt an anti-stereotyping approach, thus employing the Convention as a tool for asserting a new definition of fatherhood, untied from general assumptions. Fourthly, and finally, the Court tends to focus almost exclusively on the interests of the applicants, thus ignoring the implications of its own decisions on other potentially affected parties, in particular mothers. The position of children is largely disregarded and, when considered, is subject to variable interpretations. While in the domain of homo-parenthood, the child’s interests are interpreted according to conventional and, therefore, subjective understandings of ‘good’ parenting, when dealing with the claims of unmarried fathers, the Court appears to ground its assessment on the specific circumstances of the case.

INTRODUCTION

The primary goal of this thesis is to bring the definitions of fatherhood endorsed by the European Court of Human Rights ('ECtHR' or 'Court') to the fore. More specifically, the following jurisprudential analysis attempts to establish whether and, if so, to what extent the Court challenges or reproduces the conventional ideology of fatherhood. For current purposes, 'conventional fatherhood' refers to the individual who has specific features – both physical and behavioural – and/or plays a role, which are conventionally tied to the father figure. These conventional characteristics are derived from McGlynn's definition of the 'dominant ideology of the family',¹ and include: a biological link between the father and his child, a marital relationship with the child's mother, economic provision, and heterosexuality or, more generally, compliance with heteronormative standards. Moreover, in contrast to the reality of 'fragmented fatherhood', conventional fatherhood presupposes unity and, therefore, the coexistence of these attributes in the same individual.

Chapter 1 aims to contextualise the case-law analysis, which is further described in Chapters 2, 3, 4 and 5. It is made up of two main parts. The first one introduces the key concepts and the theoretical framework, which will guide the analysis of the jurisprudence. It exposes, *inter alia*, the gendered dimension(s) of 'fatherhood', both as a concept and as a practice. Accordingly, it underlines the *odi et amo* relationship between fatherhood and masculinity: while, in some cases, a redefinition of fatherhood is accompanied or even informed by new understandings of masculinity and vice versa, in others, the demands of fatherhood are in stark tension with concepts of masculinity. Furthermore, the first part of Chapter 1 discusses the notion of 'fragmented fatherhood' and identifies four main sociological developments which jeopardise the persistence of the abovementioned conventional features as determining factors in the allocation of paternal status or parental rights to fathers: the advent of assisted reproductive technologies ('ART'); high divorce rates and extra-marital childbearing; increased participation of women in paid employment; growing social and legal recognition of same-sex couples and, although at a slower

¹ According to McGlynn, the 'dominant ideology of the family' is that of a "white, heterosexual, married couple, with children, all living under the same roof, where the husband is the main breadwinner and the wife the primary carer of children and other dependants". C. McGlynn, *Families and the European Union – Law, Policy and Pluralism* (Cambridge University Press, 2006), 23.

pace, of homosexual parents. Finally, the second part of Chapter 1 introduces the ECtHR and its modes of operation. By critically engaging with the existing literature, this chapter emphasises the main criticism concerning the erratic use of the doctrine of the margin of appreciation, the ‘living instrument’ approach and the rule of consensus and touches upon the consequential legitimacy concerns as to the role of the ECtHR as an international court. In preparation for an in-depth analysis of the relevant jurisprudence, it provides an overview of the growing scope of the right to respect for family life under Article 8 of the European Convention of Human Rights (‘ECHR’) as well as of the main operational characteristics of the right to non-discrimination, protected in Article 14.

Chapters 2, 3, 4 and 5 address the research questions previously identified by transposing the theoretical notions, discussed in Chapter 1, into the jurisprudence of the Court. Each chapter will begin by identifying the ways in which each of the above sociological transformations challenges conventional understandings of fatherhood and will illustrate the most ‘paradigmatic’ responses provided by national legal systems. Chapter 2 examines the reaction of the Court to the fragmentation of fatherhood resulting from the advent of ART. More specifically, the case-law analysis will attempt to establish whether biology remains a necessary and/or sufficient ground for attributing legal fatherhood and parental rights. Chapter 3 undertakes a similar investigation, but in relation to unmarried and divorced fatherhood. Given the decline of marriage, the jurisprudential analysis will seek to identify the elements through which the Court has attempted to link unmarried and divorced fathers to their children. Therefore, emphasis will be placed on the ‘new’ and ‘old’ grounds to grant contact and residence rights to the applicant fathers. Chapter 4 explores the impact of increased participation of women in the labour market on the male-breadwinner model, as embedded in the law. More specifically, the Court’s potential redefinition of fatherhood beyond just the breadwinning role will be tested in the jurisprudence pertaining to the right to parental leave. Chapter 5 assesses the Court’s attachment to the norm of heterosexuality by investigating its limited, but meaningful, case-law arising from the requests of homosexual parents seeking to obtain residence rights and authorisation to adopt.

Based on the findings gathered in Chapters 2, 3, 4 and 5, the concluding remarks will shed light on the existing tensions, contradictions and trends within the definition(s) of fatherhood endorsed by the Court, across the various domains.

CHAPTER 1 – Setting the Scene: What? Why? And, How?

1. The Rise of Fathers' Rights Movements Internationally

Since the 1980s, we have witnessed the rise of fathers' rights movements in major post-industrial societies. Although traces of activism around the issue of fathers' rights can be detected in earlier periods (going as far back as in the 19th century), what has characterised the last decades is an intensification of activity in this area, accompanied by unprecedented media and political presence.² The forces underpinning the growth of fathers' mobilisation are various and controversial. Nonetheless, this phenomenon certainly reveals that men have felt the need to reaffirm their position and status as fathers. In addition to their long-standing privileged position in society, the father role has re-emerged as another indispensable characteristic of hegemonic masculinity. Before analysing the claims and ideologies of fathers' rights groups, it is important to bear in mind that the process of refiguring the rights and responsibilities of fathers is strongly influenced by cultural specificities.³ Therefore, the terms 'fathers' rights groups' and 'fathers' rights movements' are not meant to suggest total uniformity either within or across national contexts.⁴

Many commentators identify a perceived and generalised loss of paternal authority within the traditional family – and, more generally, of male privilege – as a trend underlying the abovementioned proliferation of fathers' rights groups and activities.⁵ Within Fineman's account of the US context, the first strain of fathers' rights discourse is precisely the reaction to the threat posed by re-envisioning gender equality to include the roles traditionally assigned to men in the patriarchal family.⁶ This narrative also fits with the explanation provided by Faludi, according to

² R. Collier and S. Sheldon, 'Fathers' Rights, Fatherhood and Law Reform – International Perspectives' in R. Collier and S. Sheldon (eds.), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart, 2006), 7.

³ *Ibid.*, 6-7. Contextual factors include strength of religious factors; the role and impact of key individuals; the influence of the media; the presence of a national disposition towards anti-intellectualism; understanding of gender roles, children and childhood.

⁴ *Ibid.*, 2.

⁵ M. Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (Routledge, 1995), 202.

⁶ *Ibid.*

which the evolution of fathers' rights movements underlies the attempt to take back the victories that the feminist movement gained for women in the 1960s and 1970s.⁷

Without a doubt, notions of backlash have animated certain waves of fathers' rights discourses. This has become particularly visible with respect to post-divorce family life. In this context, fathers' rights groups have often attacked mothers for allegedly misusing child support benefits to the advantage of their new partners as opposed to their children.⁸ Another frequent complaint condemns mothers for interfering with access to children.⁹ According to some advocates, feminists are responsible for wrongly opposing 'proper' mothering in the heterosexual family and, therefore, the maintenance of close ties between fathers and children also after family breakdown.¹⁰ Other activists went even further by formulating a conspiracy theory, according to which feminists have gained excessive power with regards to specific institutions, such as women's shelters and hospitals, which negatively influence mothers against fathers.¹¹ These assertions have often been accompanied by punitive reform proposals, such as the establishment of accounting systems to ensure the correct administration of benefits, or imposing fines in cases when a mother opposes contact between the father and the child.¹²

This attitude seems to reflect the rhetoric of backlash or gender war since it is based on a "univalent form of power" that is built around the dichotomy of powerful/powerless mother/father and, therefore, conceives a zero-sum as the only possible outcome of mother-father interactions.¹³ However, a number of commentators have challenged the authenticity and the accuracy of this depiction of backlash by bringing multiple layers of complexity to the fore.¹⁴ For instance, Collier

⁷ S. Faludi, *Backlash: The Undeclared War Against Women* (Chatto and Windus, 1991). This perceived loss of authority goes beyond the family sphere and, therefore, ties in very well with broader notions of the crisis of masculinity, which will be explored later in this chapter. See also S. Boyd, 'Backlash against Feminism: Canadian Custody and Access Reform Debates of the Late Twentieth Century' 2004 16(2) *Canadian Journal of Women and the Law* 255. For further literature on this, please see footnote n. 33 in Collier and Sheldon, 'International Perspectives', 8.

⁸ Fineman, 'The Neutered Mother, the Sexual Family', 202; J. Crowley, 'Adopting 'Equality Tools' from the Toolboxes of their Predecessors: The Fathers' Rights Movement in the United States' in R. Collier and S. Sheldon (eds.), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart, 2006), 84.

⁹ S. Boyd, 'Robbed of their Families?' Fathers' Rights Discourses in Canadian Parenting Law Reform Processes' in R. Collier and S. Sheldon (eds.), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart, 2006), 33.

¹⁰ *Ibid*, 34.

¹¹ *Ibid*, 35.

¹² Crowley, 'Adopting Equality Tools', 84.

¹³ Collier and Sheldon, 'International Perspectives', 9.

¹⁴ For instance, see S. Boyd commenting on the post-separation parenting law reform in Canada: S. Boyd, 'Robbed of their Families?', 28.

and Sheldon have argued that the prominence of fathers' rights movements might be better explained as one dimension of a multifaceted reconsideration of men's role as parents in light of changing household and family arrangements, societal understandings of parenting and childhood, legal regulation and modes of governance.¹⁵ These three concomitant broad factors operate, or possibly cooperate, within three distinct but linked realities: the real-world, societal imagery and legal regulation.

Firstly, a general decline in marriage as a life-long commitment, or even as a choice, has led to the fragmentation of families that, *de facto*, mainly concerns fatherhood.¹⁶ Due to these transformations, marital ties and, consequently, fathers' connections with their children have become less stable and more difficult to preserve. At the same time, societal expectations towards fathers – as well as the aspirations of fathers themselves – have shifted from merely embodying the traditional breadwinner model to emotionally engaging in the lives of their children.¹⁷ The repositioning of fatherhood is also at the core of political and legal discourses. In the UK, for instance, new ideas of 'good' fatherhood have permeated the legal regulation of post-divorce family life on the occasion of broader political reflections around notions of citizenship and responsibility.¹⁸

Those men and fathers' groups who call for a transformation of the institution of 'fatherhood' have been far less visible, but exist. In the US, Fineman identified two additional strains of fathers' rights discourses, which proposed less harsh solutions towards women and children.¹⁹ The second type of rhetoric remains focused on the relationship between the sexes within the family but without the same overtly hostile tone against women that characterises the former.²⁰ The primary concern does not lie in the loss of men's traditional privilege and power, but rather in economic injustice. Although women are not directly concerned in their arguments, the ultimate goal of restating fixed gender roles is still present. By referring to the disadvantaged position of men historically excluded by society – in particular, African-American and Hispanic fathers – this discourse calls on men to regain their position as head of the household. The emphasis

¹⁵ Collier and Sheldon, 'International Perspectives', 14; R. Collier and S. Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart, 2008), 205.

¹⁶ Collier and Sheldon, 'International Perspectives', 10.

¹⁷ *Ibid*, 11.

¹⁸ *Ibid*, 14.

¹⁹ Fineman, 'The Neutered Mother, The Sexual Family', 201.

²⁰ *Ibid*, 203.

is on the man, who must be economically and socially empowered to be able to perform the traditional role of the father as the breadwinner.²¹ The Million Man march in 1995 was possibly the most emblematic representation of a grassroots mobilisation of African-American men seeking to forge links between manhood and fatherhood.²² Their main claim was essentially that poor black men were unable to be fathers because they were denied equal access to education and employment.²³

The third strain, which Fineman describes as “more imaginary than real”, appears more genuinely concerned with the circumstances and the wellbeing of mothers and children.²⁴ Their project consists in redefining the role of fathers within contemporary societies.²⁵ More specifically, this discourse calls for an assumption of responsibility to replace fatherhood as a principally economic or disciplinary relationship.²⁶ Therefore, within this rhetoric, paternal responsibility is not synonymous with economic provision but rather with nurturing. As a result, mothers and children are the beneficiaries, and not the targets of reform. In so doing, this discourse recognises that mothers have thus far been the primary caretakers and, to a certain extent, it acknowledges the importance of mothering.²⁷

Despite the variety of ideologies underlying the rise of fathers’ rights groups, it is possible to detect a set of common themes and strategies employed by fathers’ rights groups internationally. Undoubtedly, their success in reaching and being heard in a variety of policy-making fora has been greatly facilitated by the simplicity of their demands.²⁸ Among the rhetorical tools used by fathers’ rights groups, the language of formal equality has contributed to framing their claim for justice in an easily understandable and *prima facie* logical way.²⁹ These claims gain further moral force from the use of explicit language of victimisation, which is often enriched with histories of personal tragedies and statistical evidence, albeit not always accurate.³⁰

²¹ *Ibid*, 204.

²² B. Hobson and D. Morgan, ‘Introduction’ in B. Hobson (ed.), *Making Men into Fathers – Men, Masculinities and the Social Politics of Fatherhood* (CUP, 2002), 1.

²³ *Ibid*.

²⁴ Fineman, ‘The Neutered Mother, The Sexual Family’, 204.

²⁵ *Ibid*.

²⁶ *Ibid*, 204-205.

²⁷ *Ibid*, 205.

²⁸ Collier and Sheldon, ‘International Perspectives’, 1.

²⁹ *Ibid*, 15; Boyd, ‘Robbed of their Families?’, 37.

³⁰ M. Kaye and J. Tolmie, ‘Discoursing Dads: The Rhetorical Devices of Fathers’ Rights Groups’ 1998 22 *Melbourne University Law Review*, 175-178; M. Flood, *Fatherhood and Fatherless* (ACT, The Australia Institute, Discussion Paper n. 59, 2003), 21-23.

These groups have often justified and legitimised their action through charges of discrimination and bias inherent in family law and legal processes.³¹ In their view, family law is deeply implicated in disadvantaging fathers since it is made of norms that attribute unjust weight to the interests of the mother.³² In addition to this, these legal provisions are interpreted and applied by a judiciary that is perceived to be lined up against fathers.³³ Relying on statistics which blatantly prioritise mothers as resident parents, fathers' rights groups have denounced what in their opinion are the defective methods utilised by judges in making decisions concerning post-divorce family life.³⁴ One of the most popular arguments is that courts tend to excessively lean towards mothers in child custody determinations and attach insufficient importance to the presence of fathers in children's lives after divorce.³⁵ In the US, for instance, some fathers' rights activists accuse judges of punishing them for their (limited) degree of involvement in childcare and family work before divorce, rather than viewing divorce as an opportunity for considering new divisions of labour.³⁶ These claims are often based on a pro-traditional family stance, which a fathers' rights group in Canada translated into the motto 'kids need both parents'.³⁷

The sources of frustration of fathers' rights groups explain why family law has emerged as one of the most visible targets of reform within their campaigns internationally. In divorce reform debates, several groups supported the institution of a legal presumption of contact and shared equal parenting, regardless of the history of care or assumption of responsibility when the family was

³¹ Kaye and Tolmie, 'Discoursing Dads', 164.

³² Collier and Sheldon, 'International Perspectives', 18; B. Geldof, 'The Real Love that Dare not Speak its Name: A Sometimes Coherent Rant' in A. Bainham, B. Londly, M. Richards and L. Trinder (eds.), *Children and Their Families: Contact, Rights and Welfare* (Hart, 2003), 181.

³³ *Ibid.*

³⁴ The 'anti-professionals' discourse was sometimes extended to lawyers also, who were viewed as responsible for intensifying the tensions between parents with the sole purpose of making money. See H. Rhoades, 'Yearning for Law: Fathers' Groups and Family Law Reform in Australia' in R. Collier and S. Sheldon (eds.), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart, 2006), 132-133.

³⁵ Concerning the US, see J. Crowley, 'Taking the Custody of Motherhood: Fathers' Rights Activists and the Politics of Parenting' in M. Fineman and M. Thomson (eds.), *Exploring Masculinities – Feminist Legal Theory Reflections* (Ashgate, 2013), 279; as for the UK, see Geldof, 'The Real Love', 171-200; as for Canada, see Boyd, 'Robbed of their Families?', 36.

³⁶ Crowley, 'Taking the Custody of Motherhood', 279.

³⁷ National Alliance for the Advance of Non-Custodial Parents. S. Boyd, 'Demonizing Mothers: Fathers' Rights Discourses in Child Custody Law Reform Processes' 2004 6(1) *Journal of the Association for Research on Mothering* 54. The promotion of the traditional heterosexual family is often linked to another recurrent theme in fathers' rights discourses, namely the negative consequences of fathers' absence and single motherhood. See Boyd, 'Robbed of their Families?', 32.

still intact.³⁸ In the UK, Bob Geldof and the group Fathers4Justice invoked the idea of ‘equal shares’ as the only fair arrangement post-divorce.³⁹ Despite being conceived in the best interests of the child, this proposal requires an exact fifty-fifty physical sharing between mothers and fathers and implies the need for the child to move between two houses at regular intervals.⁴⁰ However, in certain contexts, such as Australia, the call for equal parenting has been sometimes interpreted more as a symbolical demand than a proposal for actual practical change.⁴¹

Their demand for equality has been considered particularly problematic because it calls for a formal version of equality or sameness of treatment.⁴² Many feminist commentators have pointed out that the image of the family that these groups have in mind is not always characterised by equal sharing of childcare responsibilities between mothers and fathers.⁴³ Rather, fathers’ rights discourses tend to promote a traditional model of parenting, which confers little autonomy on mothers and denies them recognition for their labour of motherhood.⁴⁴ There is, therefore, an evident disconnect between the equality rhetoric employed by fathers’ rights groups and the gendered realities of parenting, both during intact relationships and after divorce as well as between the ‘ideology of change’, according to which men are becoming more engaged in family

³⁸ Boyd, ‘Robbed of their Families?’, 39; R. Collier, ‘“The Outlaw Fathers Fight Back”: Fathers’ Rights Groups, Fathers 4 Justice and the Politics of Family Law Reform – Reflections on the UK Experience’ in R. Collier and S. Sheldon (eds.), *Fathers’ Rights Activism and Law Reform in Comparative Perspective* (Hart, 2006), 60; H. Rhoades, ‘Yearning for Law’, 128-129. Interestingly, similar arguments concerning custody and contact were raised by a Swedish special non-expert group (‘Daddy Group’) appointed by the Minister of Gender Equality in 1992 to provide recommendations for policy change in order to enhance men’s parental leave. Although their views greatly influenced the reform process in the 1990s, according to Eriksson and Pringle, this cannot be considered a clear-cut example of a successful fathers’ rights group in Sweden because it is connected to wider political goals of gender equality. See M. Eriksson and K. Pringle, ‘Gender Equality, Child Welfare and Fathers’ Rights in Sweden’ in R. Collier and S. Sheldon (eds.), *Fathers’ Rights Activism and Law Reform in Comparative Perspective* (Hart, 2006), 120. On the US, see also M. Melli, ‘Guideline Review: Child Support and Time Sharing by Parents’ 1999 33(1) *Family Law Quarterly* 219-234.

³⁹ C. Smart, ‘Equal Shares: rights for fathers of recognition for children?’ 2004 24(4) *Critical Social Policy* 485. The same applies to Canada. See Boyd, ‘Robbed of their Families?’, 36.

⁴⁰ Smart, ‘Equal Shares’, 485. This study involves interviews with children who experienced ‘equal shares’ arrangements and, therefore, reveals interesting insights as to how equal shares work over the course of childhood. See also C. Piper, ‘Divorce Reform and the Image of the Child’ 1996 23(3) *Journal of Law and Society* 364-382. Arguments based on the child’s best interests to push for equal time with parents were raised also in Australia: Rhoades, ‘Yearning for Law’, 131.

⁴¹ Rhoades, ‘Yearning for Law’, 132.

⁴² On the limits of formal equality, see M. Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ 2008-2009 20 *Yale Journal of Law and Feminism* 1-23; M. Fineman, ‘Beyond Identities: the Limits of an Antidiscrimination Approach to Equality’ 2012 92(6) *Boston University Law Review* 1713-1770.

⁴³ Boyd, ‘Robbed of their Families?’, 31.

⁴⁴ Boyd, ‘Demonizing Mothers’, 54; Rhoades, ‘Yearning for Law’, 130.

life, and the slow pace of change in fathers' behaviour.⁴⁵ Arguably, these gaps embody some of the biggest paradoxes of fathers' rights movements and, consequently, one of the strongest grounds whereby the genuineness and legitimacy of their claims have been challenged.

Another significant area of reform for fathers' rights groups is child support legislation. Some groups have defined current child support systems as anachronistic.⁴⁶ Despite cogent evidence of continuing wage inequalities and occupational segregation, fathers' rights groups have often advocated for reforming child support programmes inasmuch as they are conceived for an era where most women chose to stay home and, otherwise, faced serious obstacles to paid work.⁴⁷ Moreover, some activists have appealed to the relationship between cash and care to construct their arguments. For instance, they have sometimes portrayed the failed payment of child support as a direct consequence of men's frustration and suffering due to their treatment as second-class parents.⁴⁸ At the same time, they have called for more rights as non-custodial parents as a means of ensuring greater compliance with child support orders. Apart from exemplifying fathers' ongoing possibility to opt-in/out of their relationship with children,⁴⁹ the representation of rights and responsibilities as interdependent offers a valid ground for doubting the seriousness and the actual feelings underlying fathers' claims – whether it is truly altruist and responsible or driven by selfish motives – for example, a desire to annoy the mother or for personal gratification.⁵⁰

As reported by Smart, fathers' rights claims have triggered a “relatively muted response” from the women's movement, with one remarkable exception: the endemic problem of domestic violence and the extent to which this has been disregarded in the process of recognising the importance of fathers' presence in their children's lives.⁵¹ Increased paternal involvement might be a double-edged sword for mothers. The problem of gender violence (mostly, male on female) and, more specifically, its positioning within a broader culture that accepts violence and force as

⁴⁵ J. Hearn, 'Men, fathers and the state: national and global relations' in Hobson (ed.), *Making Men into Fathers – Men, Masculinities and the Social Politics of Fatherhood* (CUP, 2002), 260.

⁴⁶ Crowley, 'Adopting Equality Tools', 84.

⁴⁷ *Ibid.*

⁴⁸ M. Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (University of Chicago Press, 1991), 88.

⁴⁹ Using Czapanskiy's words, fathers are treated like volunteers, while mothers amount to draftees. See K. Czapanskiy, 'Volunteers and Draftees: The Struggle for Parental Equality' 1991 38 *University of California at Los Angeles Law Review* 1415-1482.

⁵⁰ C. Smart, 'Preface' in R. Collier and S. Sheldon (eds.), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart, 2006), xi.

⁵¹ *Ibid.*, vii-viii.

male features, conveys confusing messages as to a greater entitlement of fathers to maintain their ties with children.⁵² Besides this, it would seem that most of the requests made by these fathers go hand-in-hand with women's and children's desires and expectations from fathers, *in primis* shared care and responsibility.⁵³ Therefore, timing and context appear to have been the problematic aspects of fathers' rights claims.⁵⁴ Paradoxically, fathers become critical of a gender division of labour only at the time of separation or divorce, allegedly when the emotional power of mothering becomes an incontrovertible fact.⁵⁵

2. Masculinities and Fatherhood

In sociological research, fathers have become an important area of focus since the 1970s. Early literature examined the correlation between paternal presence and child development.⁵⁶ A subsequent area of interest concerned the experiences of fathers and their attempt to change their experiences. Since late 1980s and early 1990s, a cornerstone research topic has resonated with the changing nature of fatherhood and, more specifically, with the 'new father' ideal and figure.⁵⁷ Apparently, an excessive eagerness resulted in often uncritical and unrealistic accounts of the 'new father'.⁵⁸ One of the most fundamental reasons for this misrepresentation lay exactly in the absence of a gender perspective in analyses of fatherhood.⁵⁹

Around the same period, some gender scholars began to produce critical analyses of men and masculinities primarily from a sociological perspective.⁶⁰ Beforehand, men did not amount to gendered beings and, therefore, were largely omitted as an object of gender analysis within

⁵² N. Dowd, *Redefining Fatherhood* (NYU Press, 2000), 11.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ For instance, M. Lamb, *The Role of the Father in Child Development* (Wiley, 1976).

⁵⁷ B. Brandth and E. Kvande, 'Masculinity and Child Care: the Reconstruction of Fathering' 1998 26(2) *The Sociological Review* 294. The concept of 'new father' will be explained later.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, 295.

⁶⁰ *Inter alia*, A. Brittan, *Masculinity and Power* (Basil Blackwell, 1989); H. Brod (ed.), *The Making of Masculinities. The New Men's Studies* (Allen and Unwin, 1987); H. Brod and M. Kaufman, *Theorizing Masculinities* (Sage, 1994); R. Connell, *Masculinities* (Polity Press, 1995); M. Kimmel and M. Messner (eds.), *Men's Lives* (MacMillan, 1992); D. Morgan, *Discovering Men* (Routledge, 1992). Apart from being the discipline of origin, sociology remains the predominant perspective in masculinities studies. The psychological contribution is also quite comprehensive. See, for instance, D. Buchbinder, *Masculinities and Identities* (Melbourne University Press, 1994); J. Beynon, *Masculinities and Culture* (Open University Press, 2002).

feminist theory.⁶¹ Feminist legal literature has been predominantly concerned with documenting the patterns of disadvantage and discrimination suffered by women.⁶² It has developed through different waves, whose main claims can be summarised as follows. Liberal feminists viewed men as the point of reference and called for equal treatment of women, thus contesting the widespread stereotypical belief that women need special protection.⁶³ Their main concern lay in the systemic exclusion of women from educational and vocational opportunities and, therefore, their goals were merely assimilationist.⁶⁴ As a result, these scholars did not go as far as to foresee the *de facto* gendered implications of a variety of laws and legal practices.⁶⁵

Although agreeing with the liberal call for gender neutrality in relation to most issues, difference theorists criticised the limitations of the equal treatment paradigm and demanded recognition of the differences between the genders, particularly in the areas of reproduction and childrearing.⁶⁶ In relation to maternity leave, for instance, difference theory argued that a formal version of equality denied important biological differences between men and women and, therefore, ended up harming women.

Radical theorists focused more closely on women's subordination and, more generally, on the unequal power relations between men and women.⁶⁷ They assert that the male norm, which defines law and society, operates to promote gender inequality and women's oppression. To a certain extent, therefore, this wave of feminism has been read as proposing a rather limited portrayal of both men and women: men as potentially all bad and women as victims of male oppression.⁶⁸ In this context, radical feminists view dramatic social transformation as the only means of remedying power imbalance. Different from the previous three stages, postmodern feminism is a woman-centred theory.⁶⁹ As such, it is mainly concerned with the dilemma of

⁶¹ J. Hearn and D. Morgan, 'Men, Masculinities and Social Theory' in J. Hearn and D. Morgan (eds.), *Men, Masculinities and Social Theory* (Unwin Hyman, 1990), 7; S. Ruddick, 'The Idea of Fatherhood' in H. L. Nelson (ed.), *Feminism and Families* (Routledge, 1997), 206.

⁶² N. Levit, 'Feminism for Men: Legal Ideology and the Construction of Maleness' (1996) 43 *UCLA Law Review*, 1039.

⁶³ *Ibid*, 1044.

⁶⁴ *Ibid*, 1042, 1044.

⁶⁵ *Ibid*, 1044.

⁶⁶ *Ibid*, 1044, 1045.

⁶⁷ For example, the scholarship of Catherine Mackinnon is emblematic of the approach of dominance theory. In her work, sexuality is seen as the primary *locus* and source of women's wider subordination to men.

⁶⁸ Levit, 'Feminism for Men', 1049.

⁶⁹ One notable scholar adhering to this wave of feminism is M. Matsuda. One of her main contributions consists in encouraging us to "ask the other question", namely to look for forms of subordination besides gender, which we might

essentialism and insists on the idea that there exists no one female experience; rather, race, class, ethnicity and culture are major factors in shaping women's identities and lives.⁷⁰

Bearing in mind the risk of oversimplifying sophisticated and intricate theoretical insights, each stage of feminist legal theory seems to more or less directly propose a singular approach to men and overwhelmingly depict them as a monolithic group.⁷¹ Following the account above, it appears that men have been treated as object of analysis, as the 'other', as the oppressor or have been simply omitted.⁷² One possible exception to this trend in feminist legal theory can be found in Ginsburg's litigation work in the 1970s. Ginsburg's decision to represent male plaintiffs in order to challenge the constitutionality of sex-based state action has been frequently defined a "strategic choice",⁷³ but not always in the positive sense. According to some, in her arguments, attention to the condition of men pursued a particular goal: more specifically, men's disadvantage was used to create equal opportunities for women.⁷⁴ More nuanced interpretations of Ginsburg's work, however, have explained that the idea of choosing male plaintiffs subtly aimed at encouraging the development of a new theory of equal protection grounded on an anti-stereotyping principle.⁷⁵ Rather than seeking to promote the role of women,⁷⁶ it appears that her ultimate purpose – then actual achievement – was therefore to shed light on the institutions and social practices, which preserve and reiterate sex-based inequalities.⁷⁷

Already in the early 1970s, however, some feminist scholars and activists started to acknowledge and argue that men were also victims of sexism.⁷⁸ Several key academics in the US began to question and criticise the models in their disciplines.⁷⁹ Pleck, for example, offered a

have missed, and explore how multiple inequalities built on each other. M. Matsuda, 'Besides My Sister, Facing the Enemy: Legal Theory Out of Coalition' 1993 43 *Stanford Law Review* 1189.

⁷⁰ Levit, 'Feminism for Men', 1050-1051.

⁷¹ N. Dowd, *The Man Question – Male Subordination and Privilege* (NYU Press, 2010), 13.

⁷² Levit, 'Feminism for Men', 1041.

⁷³ D. Cole, 'Strategies of Difference: Litigating for Women's Rights in a Man's World' 1984 2 *Law and Inequality* 56.

⁷⁴ *Ibid.*, 39. In particular, many commentators argued that, in Ginsburg's view, male plaintiffs would stimulate greater empathy from judges and would therefore make them more willing to help. For instance, see M. Torrey, 'Thirty Years' 2000-2001 22 *Women's Rights Law Reporter* 149; J. Yatskis Dukart, 'Geduldig Reborn: Hibbs as a Success (?) of Justice Ruth Bader Ginsburg's Sex Discrimination Strategy' 2005 93(2) *California Law Review* 574.

⁷⁵ C. Franklin, 'The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law' (2010) 85 *New York University Law Review* 88.

⁷⁶ Cole, 'Strategies of Difference', 54.

⁷⁷ *Ibid.*

⁷⁸ Dowd, 'The Man Question', 18.

⁷⁹ *Ibid.*

remarkable critique of psychological and sociological models of that period.⁸⁰ In the 1990s, masculinities studies proliferated across different disciplines, as exemplified by courses offered at universities, conferences and publications.⁸¹ Different from other disciplines, legal scholarship has placed relatively limited and marginal attention to the harm of gender stereotypes on men and how legal constructs preserve and reproduce these stereotypes.⁸² More specifically, feminist legal theorists are criticised for limiting their exploration to women's experiences with men from a woman's standpoint and, therefore, for overlooking men's experiences with women from a man's standpoint.⁸³ Only relatively recently, and still in a primarily residual fashion, feminist legal scholarship has begun to explore how the law and legal practices contribute to creating constructs of masculinity.⁸⁴

The study of masculinities is a natural progression and an integral part of feminist analysis.⁸⁵ It is committed to "ask the man question",⁸⁶ namely "what is the position of boys and men in this situation?"⁸⁷ Dowd identifies various ways how asking the man question will make a difference to feminist analysis.⁸⁸ Firstly and most importantly, by examining the construction of power and privilege, masculinities analysis deepens our knowledge of the roots and the complex dynamics of subordination and, therefore, contributes to the goal of women's equality.⁸⁹ Men's interactions with other men influence the ways in which they manifest their masculinity that, in turn, has meaningful repercussions on their relationships with women.⁹⁰ Similarly, gender role stereotyping harming one gender inevitably crystallises expectations towards the other gender.⁹¹ The most obvious example is the stereotypical image of the father as the breadwinner, which goes

⁸⁰ J. Pleck, *The Myth of Masculinity* (MIT Press, 1981); J. Pleck and E. Pleck (eds.), *The American Man* (Prentice Hall, 1980).

⁸¹ Dowd, 'The Man Question', 18.

⁸² Levit, 'Feminism for Men', 1052.

⁸³ R. Collier, *Men, Law and Gender: Essays on the 'Man' of Law* (Routledge, 2010), 9-20.

⁸⁴ One exception from the 1990s is B. Bending, 'Images of Men in Feminist Legal Theory' 1993 20 *Pepperdine Law Review* 991-1052. A more recent example is M. Fineman and M. Thomson (eds.), *Exploring Masculinities – Feminist Legal Theory Reflections* (Ashgate, 2013).

⁸⁵ R. Collier, 'Masculinities, Law and Personal Life: Towards a New Framework for Understanding Men, Law and Gender' 2010 33 *Harvard Journal of Law and Gender* 434.

⁸⁶ According to Dowd, we are pushed to ask 'the man question' by the attained awareness that not only women face subordination, as supported by antiessentialist critiques of feminism. See Dowd, 'The Man Question', 1.

⁸⁷ N. Dowd, 'Asking the Man Question: Masculinities Analysis and Feminist Theory' 2010 33 *Harvard Journal of Law and Gender* 415.

⁸⁸ Dowd, 'Asking the Man Question', 419-424.

⁸⁹ Dowd, 'Asking The Man Question', 418.

⁹⁰ Dowd, 'The Man Question', 62-63; Levit, 'Feminism for Men', 1052.

⁹¹ Levit, 'Feminism for Men', 1113.

hand-in-hand with the expectation that the woman's role is to stay home and look after the children. Accordingly, any discrimination suffered by men eventually operates to the detriment of women.⁹² For instance, prosecuting only men for the offence of statutory rape simply strengthens the view of men as perpetrators and grants women protection, with the side-effect of restricting the latter's sexual freedom.⁹³

Masculinities theory questions how gender subordinates some or most men, how privilege is consciously or unconsciously accepted by men and what price is paid for privilege.⁹⁴ Therefore, most of the theoretical work on masculinities has attempted to reveal how male identity is constructed and sustained, rather than how to challenge or alleviate the effects of patriarchy.⁹⁵ A crucial argument is that masculinities are socially constructed, rather than biologically determined, and therefore they are subject to constant change and redefinition.⁹⁶ Accordingly, masculinity is often portrayed as a quality that cannot be attained once for all; rather, it is something that has to be continuously pursued on a daily basis.⁹⁷

A key endeavour of masculinities analysis is to rectify an essentialist view of men. Masculinities scholarship is consciously and literally plural.⁹⁸ There are multiple masculinities: a preferred one that is at the top of male hierarchy and is called hegemonic masculinity as well as subversive masculinities and subordinated masculinities, which are mostly defined across the lines of race, class and sexual orientation.⁹⁹ By shedding light on a variety of male identities,

⁹² Levit, 'Feminism for Men', 1052.

⁹³ F. Olsen, 'Statutory Rape: A Feminist Critique of Rights Analysis' 1984 63(3) *Texas Law Review* 404-405.

⁹⁴ Dowd, 'The Man Question', 1-3. It is important to point out that, in addition to the following contributions, masculinities analysis entails a set of risks and challenges. One of the most pressing concerns is making gender analysis a zero-sum game in line with an either/or approach. A connected risk is taking the focus away from women or charging women with causing harm to men, thus reviving old stereotypes and feeding an anti-feminist backlash. See Dowd, 'Asking the Man Question', 424.

⁹⁵ Dowd, 'The Man Question', 26. This sheds light on one of the existing differences between masculinities theory and feminist theory. The latter remains concerned with issues of inequality far more than with identity questions. On this, see M. Fineman, 'Feminism, Masculinity and Multiple Identities' 2013 13(2) *Nevada Law Journal* 620-626. This explains why men's relationships to other men are often considered a more pronounced dimension of masculinities theory.

⁹⁶ Dowd, 'The Man Question', 26.

⁹⁷ *Ibid*, 28.

⁹⁸ The focus on diversity is immediately reflected in the term or concept 'masculinities theory', as opposed to 'masculinity theory'.

⁹⁹ *Inter alia*, R. Connell and J. Messerschmidt, 'Hegemonic Masculinity: Rethinking the Concept' 2005 19(6) *Gender and Society* 829-859; R. Connell, *Gender and Power: society, the person and sexual politics* (Polity Press, 1987), 183-188; M. Kimmel, 'Masculinity as Homophobia' in M. Gergen and S. Davis (eds.), *Toward a New Psychology of Gender: A Reader* (Routledge, 1997), 33. See also, F. Cooper, 'Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance and Hierarchy' 2006 39(3) *University of California Davis Law Review* 853-906.

masculinities work uncovers ways in which the dominant gender system produces subordination and differentiation among men.¹⁰⁰ Another central objective of masculinities theory consists in making harm suffered by men and boys visible.¹⁰¹ Even the most privileged men exercise privilege at a cost. One frequent example is military service, both in terms of compulsory conscription and sacrifice of men's bodies in war.¹⁰² Whether this is the price men pay for privilege or the result of performing masculinities by exercising domination over other men, one of the pervasive claims is that men disproportionately represent the victims of male violence.¹⁰³

A recurrent theme within masculinities work is 'crisis'. Although *prima facie* contradictory, Kimmel's words are very emblematic of the position of men: "Men as a group are in power (when compared with women), but they do not feel powerful".¹⁰⁴ This sense of powerlessness might reflect ideological shifts in traditional notions of masculinity as well as embracing new consciousness that contest old approaches.¹⁰⁵ In 1985, Carrigan et al. identified two major dimensions of change in the constitution of masculinity: an intensification of tensions in their relationships with women and the crisis of heterosexual masculinity that is more frequently perceived as out-dated.¹⁰⁶ As argued by Beynon, crisis might even have an applied dimension when it mirrors empirical data indicating low outcomes for boys and men in terms of health, emotional wellbeing, crime and stress.¹⁰⁷ Another persistent claim in the narrative of the 'crisis' in masculinity has been the link between the profound change masculinity has experienced with a shift in the status of fatherhood, more specifically the decline of traditional masculine authority within the family as it relates to men's relationships with women and children.¹⁰⁸

As mentioned above, fathers have not always been examined as gendered subjects.¹⁰⁹ Only recently, studies on fatherhood have been influenced by growing theoretical work on masculinities. Nonetheless, it is clear that fatherhood is an essential form of male behaviour and a crucial life

¹⁰⁰ Dowd, 'Asking the Man Question', 423; Dowd, 'The Man Question', 3; M. Fineman, 'Feminisms and Masculinities: Questioning the Lure of Multiple Identities' in M. Fineman and M. Thomson (eds.), *Exploring Masculinities – Feminist Legal Theory Reflections* (Ashgate, 2013), 17.

¹⁰¹ Dowd, 'Asking the Man Question', 420.

¹⁰² Dowd, 'The Man Question', 3; Dowd, 'Asking the Man Question', 421; Levit, 'Feminism for Men', 1059.

¹⁰³ Dowd, 'The Man Question', 3; Levit, 'Feminism for Men', 1057. See also A. Harris, 'Gender, Violence, Race and Criminal Justice' 2000 52 *Stanford Law Review*, 777-807.

¹⁰⁴ M. Kimmel, *The Gendered Society* (Oxford University Press, 2004), 100.

¹⁰⁵ Dowd, 'The Man Question', 19.

¹⁰⁶ T. Carrigan, R. Connell and J. Lee, 'Towards a New Sociology of Masculinity' 1985 14 *Theory and Society* 598.

¹⁰⁷ Beynon, 'Masculinities and Culture', 76.

¹⁰⁸ R. Collier, *Masculinity, Law and the Family* (Routledge, 1995), 14.

¹⁰⁹ Dowd, 'The Man Question', 105.

role for men. As such, it is influenced and shaped by social representations.¹¹⁰ Masculinities are consistently defined in a negative form: to be a man means not to be a woman and not to be gay.¹¹¹ Accordingly, the dominant imagery of masculinity describes male behaviour as characterised by control, dominance and independence.¹¹² Against this imagery, parenting requires men to take up qualities and attributes that are conventionally seen as unmanly and, therefore, it is evidently in tension with concepts of masculinity.¹¹³ Representing the male within this culture, the degree of engagement and types of engagement of fathers in certain activities are over-determined.¹¹⁴

Fatherhood is also an aspect of men's lives where the price of patriarchy becomes particularly evident through the construction of parenting as entailing economic provision rather than caregiving.¹¹⁵ Apart from leading to male success in wage work, breadwinning expectations have contributed to creating work structures and norms which set a hierarchy between family and work, thus effectively determining men's absence or limited involvement in caregiving work.¹¹⁶ What Connell as well as other theorists call 'hegemonic masculinity' – which in present Western societies is closely connected to income generating work – keeps men far away from care and, therefore, from their children. Different from mothers, who are expected to nurture their children and cannot choose to do otherwise, most fathers are not expected to nurture their children but to economically provide for their families. The obstacles that men encounter in being engaged fathers are the product of socialisation as well as of workplace and market structures. The norms of success and power regulating the workplace produce outcomes that disregard and, therefore, clash with the care needed by children.¹¹⁷

According to some commentators, the 'crisis' in masculinity and the interconnected shift in the status of fatherhood have a specifically legal dimension.¹¹⁸ This 'crisis' has been marked by a deflation of legal rights, which were historically granted to men over women, children and property.¹¹⁹ Let us take the example of child custody in the United States or, more generally, in the legal tradition of Common Law. Under early Anglo-American rules, it was extremely difficult

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Dowd, 'Redefining Fatherhood', 11.

¹¹⁴ Fineman, 'The Neutered Mother, the Sexual Family', 206.

¹¹⁵ Dowd, 'The Man Question', 3.

¹¹⁶ *Ibid.*, 59.

¹¹⁷ *Ibid.*, 4.

¹¹⁸ Collier, 'Masculinity, Law and the Family', 177.

¹¹⁹ *Ibid.*

for mothers to have their claims heard in relation to custody determinations in divorce cases.¹²⁰ Common Law essentially conferred an absolute right of ownership and control over their children on the father.¹²¹ This legal position was grounded on the notion that fathers were best able to financially provide for their children.¹²² Contrariwise, mothers were considered to be the ‘inferior’ parent and they were only entitled to reverence and respect, but no rights. In divorce proceedings, courts did no more than verify whether particular circumstances demanded a departure from the rule of paternal custody and control. Courts used to consider children as property and, therefore, fathers used to be automatically granted the physical custody of children in their capacity as the most important property-holder.¹²³

Already in the 1920s, the authoritarian role of the father started to be questioned *vis-à-vis* childcare manuals celebrating motherhood as the repository of family values.¹²⁴ At the end of the nineteenth century, societal understanding of children shifted from property to individuals with special developmental needs.¹²⁵ Research began to emphasise the peculiar and special nature of pre-adult years.¹²⁶ Children’s particular needs were, in turn, viewed as demanding a set of interpersonal dynamics that, allegedly, only mothers as special nurturers could support.¹²⁷ By the 1980s, therefore, the ‘sacred rights’ of a father ceased to exist in the form of formal, legal and justifiable entitlements, which he could claim in relation to his children.¹²⁸

The departure from the *a priori* paternal right to custody was achieved with the assertion of the ‘best interests of the child’ standard as the principle governing custody adjudications.¹²⁹ This novelty prompted repositioning the focus of custody laws and determinations on the right of the child to be placed in the more appropriate custodial arrangement. However, the principle’s vague formulation entailed significant practical challenges and implementation complexities. In the face of a deliberately indeterminate formulation, courts created subsidiary rules to ensure

¹²⁰ M. Fineman, ‘The Neutered Mother’ 1992 46 *University of Miami Law Review* 656.

¹²¹ *Ibid*; S. May, ‘Child Custody and Visitation’ 2001 2 *Georgetown Journal of Gender and the Law* 382.

¹²² Fineman, ‘The Neutered Mother’, 656.

¹²³ Crowley, ‘Taking the Custody of Motherhood’, 269; Dowd, ‘Redefining Fatherhood’, 4.

¹²⁴ Collier, ‘Masculinity, Law and the Family’, 189.

¹²⁵ Crowley, ‘Taking the Custody of Motherhood’, 269; Fineman, ‘The Neutered Mother’, 656.

¹²⁶ For instance, see I. Pinchbeck and M. Hewitt, *Children in English Society: From the Nineteenth Century to the Children Act, 1948* (Routledge, 1973).

¹²⁷ Fineman, ‘The Neutered Mother’, 656; Crowley, ‘Taking the Custody of Motherhood’, 269.

¹²⁸ Collier, ‘Masculinity, Law and the Family’, 189.

¹²⁹ *Ibid*; Fineman, ‘The Neutered Mother’, 656.

coherence and render the principle immediately meaningful.¹³⁰ Judges adopted, *inter alia*, the so-called “tender years” doctrine, which privileged maternal custody under the assumption that it would be in the best interests of the child to continue to be nurtured by the mother.¹³¹ In most cases, courts did no more than issue orders that confirmed the *status quo*, without actually assessing and identifying who was the most appropriate parent.¹³² By acknowledging the value of the mother's bond to a child, courts implemented the best-interest principle by granting the custody of children primarily to women. As a result, a gender division of labour overwhelmingly survived the end of the parental relationship.

The “tender years” doctrine shaped judicial determinations of custody for decades. Only in the early 1970s, increasing divorce rates gave rise to debates and tensions over the law regulating custody of children.¹³³ Reflecting these changing times, strict provisions for the collection of overdue child support payments encouraged the formation of fathers’ rights groups.¹³⁴ In the wake of liberal feminist calls for gender neutrality in the family context, these groups complained that men were subject to child custody laws and decision-making processes that were perceived as biased towards mothers.¹³⁵ Both liberal feminists and fathers’ rights groups pursued the ideal of a genderless family, where husbands and wives equally shared childcare and domestic responsibilities.¹³⁶ Accordingly, proposals to replace the maternal presumption with joint custody arrangements were advanced as a means of furthering equality between the sexes.

In the US, these aspirations have, more generally, materialised in a well-established legal doctrine of anti-discrimination, which is sceptical of any generalisation about gender difference and fears paternalism as a threat to individual autonomy.¹³⁷ This emerges quite clearly from the US rejection of any special entitlements for maternity as grounded on paternalistic gender stereotypes, rather than on the respect for women’s free choice.¹³⁸ On the other hand, with few

¹³⁰ Fineman, ‘The Neutered Mother’, 656.

¹³¹ *Ibid.*, 657; S. May, ‘Child Custody and Visitation’, 382; E. M. Ellis, *Divorce Wars: Interventions with Families in Conflict* (American Psychological Association, 2000).

¹³² J. Eekelaar, E. Clive, K. Clark and S. Raikes (eds.), *Custody after divorce: the disposition of custody in divorce cases in Great Britain* (Centre for Socio-Legal Studies, 1977).

¹³³ Fineman, ‘The Neutered Mother’, 658.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*, 659.

¹³⁶ *Ibid.*

¹³⁷ J. Suk, ‘Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Reconciliation’ 2010 110(1) *Columbia Law Review* 50.

¹³⁸ *Ibid.*, 4.

exceptions, European legal orders have not yet fully committed to the proposition that gender neutrality is a precondition for gender equality.¹³⁹ In most European constitutions as well as in EU law and European human rights, provisions requiring equal treatment and prohibiting discrimination on the basis of sex are accompanied by provisions or doctrinal interpretations authorising or even requiring public authorities to take measures that differentiate on grounds of sex with the aim of rectifying systemic inequalities and redistributing different forms of benefits.¹⁴⁰

In so doing, European policies make use of assumptions about gender roles, which are likely to be rejected as gender stereotypes in the US legal culture.¹⁴¹ As an example, it is sufficient to think of European maternity leave policies, which require all States to provide for at least fourteen weeks of paid maternity leaves – two of which are compulsory, thus imposing periods when women cannot choose to work.¹⁴² These diverging approaches are also reflected in the two visions of post-industrial gender order identified by Fraser.¹⁴³ The first, which is named the Universal Breadwinner, is endorsed by most US feminists and liberals and aims to enhance gender justice by promoting women's employment, in particular through the provision of employment-enabling services.¹⁴⁴ The second, which she calls the Caregiver Parity model, drives the political practice of most Western European feminists and social democrats and seeks to foster gender justice by supporting informal care work, through the provision of caregiver allowances, for example.¹⁴⁵

It is argued that both models have produced an incomplete and insufficient revolution.¹⁴⁶ On both sides of the Atlantic, gendered patterns of working and caring persist: the proportion of women in paid employment is lower than men's; women continue to be paid less than men for equal work; and a tiny minority of women hold top positions in companies. Moreover, although fathers' involvement in childcare has increased since 1980s, we cannot talk of greater involvement in absolute terms. Men's heightened engagement has benefited younger children more than

¹³⁹ *Ibid.*, 49.

¹⁴⁰ R. Rubio-Marin, 'A New European Parity-Democracy Sex Equality Model and why it won't Fly in the United States' 2012(60) *The American Journal of Comparative Law* 113.

¹⁴¹ Suk, 'Are Gender Stereotypes Bad for Women?', 5.

¹⁴² Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

¹⁴³ N. Fraser, 'After the Family Wage: A Postindustrial Thought Experiment' in N. Fraser, *Fortunes of Feminism: From State-Managed Capitalism to Neo-Liberal Crisis* (Verso Books, 2013), 114.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ For instance, see Fraser, 'After the Family Wage' and Suk, 'Are Gender Stereotypes Bad for Women?'.

adolescents, sons more than daughters and biological children more than stepchildren.¹⁴⁷ In the US, among adults living in households with children under the age of six over the period 2010-2014, men devoted on average 23 minutes per day to physical care (such as, bathing or feeding a child), while, in comparison, women spent one hour.¹⁴⁸ Even more asymmetrical patterns characterise European States. Results drawn from the database HETUS reveal noteworthy differences between men and women in the average amount of time per day devoted to unpaid work.¹⁴⁹ Among couples with at least one child aged under six, the gender gap is of almost six hours in Italy, more than three in France and almost four in Germany.¹⁵⁰

Above all, women's time remains more tied up in domestic and childcare activities than men's. What are the reasons for this situation? In Europe, special entitlements for maternity end up reinforcing women's primary role in childcare. Moreover, non-existent or far less generous provisions for paternity leave further strengthen traditional gender roles. In the US, employers apply the same standard to differently-situated individuals; indeed, also in dual-career families, women tend to do more childcare than men.¹⁵¹ Therefore, despite the *prima facie* anti-stereotyping approach, the framework in place fails to challenge the *status quo* and, thus, to disrupt the underlying inequalities upon which stereotypes are based. Taken further, the adverse consequences of the US model might go as far as to devalue and render caregiving invisible, thus producing unrealistic and punitive responses that further complicate the reality of women's lives. As a result, in both Europe and the US, breadwinning and caregiving continue to be constructed as separate roles, labelled masculine and feminine respectively.¹⁵² The vision of the Universal Caregiver,¹⁵³ which would require "induc(ing) men to become more like most women are now",¹⁵⁴ is far from reality.

¹⁴⁷ Dowd, 'Redefining Fatherhood', 41.

¹⁴⁸ United States Department of Labor, Bureau of Labor Statistics, 2015. *American Time Use Survey – 2014 Results* (news release) 14 June 2015, available at <http://www.bls.gov/news.release/atus.nr0.htm> (last access on 1 December 2015).

¹⁴⁹ Statistics Finland and Statistics Sweden, 'Harmonised European Time Use Survey', online database created 2005-2007 available at <https://www.h2.scb.se/tus/tus/default.htm> (last access on 9 May 2015).

¹⁵⁰ *Ibid.*

¹⁵¹ Suk, 'Are Gender Stereotypes Bad for Women?' 57.

¹⁵² Fraser, 'After the Family Wage', 134.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.* Suk suggests making paternity leave compulsory in order to ensure that men today do the same as women. See Suk, 'Are Gender Stereotypes Bad for Women?', 69.

The contribution that masculinities analysis can bring to this debate is to shed light on the social, cultural and economic obstacles that men encounter in relation to fatherhood. According to Dowd, “including men means situating women within a more realistic picture of gender subordination, while acknowledging men’s subordination in that picture”.¹⁵⁵ As opposed to a ‘either/or’ approach, a masculinities analysis offers the possibility – and the challenge – to elaborate in-depth reflections that concurrently look at men and women as individuals in relation to each other, as opposed to independent subjects, even if gender-specific problem-solving is needed.¹⁵⁶ The positions of fathers and mothers in relation to family care and work are asymmetrical and therefore call for gender-specific strategies. However, they are also interdependent and, thus, it seems fundamental to connect the two gender-specific perspectives in order to understand how inequalities interlock. With the support of masculinities analysis, therefore, feminist scholarship can effectively investigate issues around fatherhood in a gender-specific but gender-linked fashion.¹⁵⁷

Relying on the teachings of masculinities theories, the following analysis is based on the conviction that fathers need to be viewed and discussed as gendered and as men. Masculinities insights will also be employed in order to unravel and understand complex social relationships and structures operating within the family context and beyond.¹⁵⁸ Having spelt out how male identity is constructed and sustained, feminist legal theory can step in and provide a set of theoretical tools to more strongly tackle disadvantage and inequality.¹⁵⁹ By systematically applying feminist legal theory to situations where gender stereotypes harm men, the following analysis will therefore clarify the ways in which legal constructs and methods of legal analysis and adjudication have contributed to shaping and, possibly, redefining fatherhood. Therefore, my focus on fathers aims to offer what might have been missed in previous literature and to hint at how fathers’ inequalities inevitably reconnect to women and children.

¹⁵⁵ Dowd, ‘The Man Question’, 67.

¹⁵⁶ Dowd, ‘The Man Question’, 66; Dowd, ‘Asking the Man Question’, 417.

¹⁵⁷ Dowd, ‘The Man Question’, 123.

¹⁵⁸ According to Fineman, this is also the way in which Dowd uses masculinities work in her book *The Man Question*. See M. Fineman, ‘Feminisms and Masculinities: Questioning the Lure of Multiple Identities’ in M. Fineman and M. Thomson, *Exploring Masculinities – Feminist Legal Theory Reflections* (Ashgate, 2013), 21.

¹⁵⁹ Dowd, ‘The Man Question’, 65.

3. The 'New Father'

Despite the persisting inequalities, the emergence of a revisited cultural imaginary of what being a 'good father' entails is undeniable. At least from an ideological perspective, we have embraced a more engaged vision of fatherhood, thus proving it possible to alter the norms of masculinities. Already in 1987, Pleck described the ideal father as more than the breadwinner of the family but someone who combines full-time work with daily childcare –¹⁶⁰ using Crowley's words, "just like any other modern mother".¹⁶¹ Our model of fatherhood has therefore changed from men's role as authoritarian patriarchs to expectations of co-parenting and shared nurturing, embraced in the ideal of 'new fatherhood'. As defined by Collier and Sheldon, a 'new father' is a "man who is not (or, at least, not just) seen as a primary breadwinner but is also, increasingly, a 'hands-on' carer, an individual who is (or who should be) emotionally engaged and involved in the day-to-day care of his children".¹⁶²

This shift has become a pattern among a growing proportion of fathers but, at the same time, it has entailed men struggling with the concept of fatherhood. One of the complexities of refashioning fatherhood lies in the fact that many fathers attempt to construct tasks and roles that are not traditional for men as masculine with the purpose of alleviating the threat to their masculinity.¹⁶³ It is, therefore, not surprising that doubts as to whether involved fatherhood represents a real change or simply a reconstruction of hegemonic masculinity have been raised.¹⁶⁴ Studies on involved fathers indicate that most of fathers tend to masculinize care.¹⁶⁵ Masculine care, as redefined by some Norwegian fathers, consists in being a friend to the child, teaching independence and continuing to be heavily involved in the labour market.¹⁶⁶ Other researchers have pointed out that engaged fathers show a greater involvement in instrumental functions (as

¹⁶⁰ J. Pleck, 'American Fathering in Historical Perspective' in M. Kimmel (ed.), *Changing Men: New Directions in Research on Men and Masculinity* (Sage, 1987).

¹⁶¹ Crowley, 'Taking Custody of Motherhood', 267.

¹⁶² Collier and Sheldon, 'Fragmenting Fatherhood', 209.

¹⁶³ T. Maurer and J. Pleck, 'Fathers' Caregiving and Breadwinning: A Gender Congruence Analysis' 2006 7(2) *Psychology of Men and Masculinity* 101.

¹⁶⁴ For instance, see L. Plantin, S. Mansson and J. Kearney, 'Talking and Doing Fatherhood: On Fatherhood and Masculinity in Sweden and England' 2003 1(1) *Fathering* 3-26.

¹⁶⁵ Dowd, 'The Man Question', 112.

¹⁶⁶ Brandth and Kvande, 'Masculinity and Child Care', 310.

opposed to expressive functions), such as discipline, protecting, income and encouraging responsibility, which are known as the traditional functions of fathers.¹⁶⁷

Doucet, in her study on men as primary caregivers, employs the concept of ‘borderwork’ to describe the ongoing focus on gender differences in parenting.¹⁶⁸ She concludes that, even if the picture resulting from her study shows that the practices of mothering and fathering have many commonalities, fathers experience parenting in a different manner and find it important to explicitly state this difference.¹⁶⁹ By refashioning care work and masculine conceptions of care, these fathers create new types of masculinities.¹⁷⁰ Therefore, as argued by Catlett and McKenry, fathers have not abandoned their traditional roles, but they have simply attempted to re-envision them.¹⁷¹ As a result, traditional fatherhood has not been replaced; new features are merely added on.¹⁷² The ‘new father’ encompasses both traditional characteristics, in particular breadwinning, with greater participation and nurture.¹⁷³

The ideal of ‘new fatherhood’ has gone as far as to reconstruct fathers as a distinct kind of desirable presence within families and in the lives of their children and, as a result, a father’s absence is seen as problematic.¹⁷⁴ Relying on a simplistic understanding of the sex role theory, this construction of father presence has been couched primarily by reference to the father’s alleged specific function as an appropriate male role model.¹⁷⁵ For instance, Blankenhorn contested an androgynous parenting model on the ground that gender specific roles are crucial to a child’s development.¹⁷⁶ He went further by arguing that men’s conviction in their own uniqueness is fundamental to giving men a strong motive to bond with their children; and that connection, in turn, is crucial to becoming a ‘good’ man.¹⁷⁷ At the same time, the initial absence of paternal

¹⁶⁷ G. Finley and S. Schwartz, ‘Parsons and Bales Revisited: Young Adult Children’s Characterisation of the Fathering Role’ 2006 7(1) *Psychology of Men and Masculinity* 52.

¹⁶⁸ A. Doucet, *Do Men Mother? Fathering, Care and Domestic Responsibility* (Toronto University Press, 2006), 219.

¹⁶⁹ *Ibid.*, 238.

¹⁷⁰ *Ibid.*

¹⁷¹ B. Catlett and P. McKenry, ‘Class-based Masculinities: Divorce, Fatherhood and the Hegemonic Ideal’ 2004 2(2) *Fathering* 1-20.

¹⁷² Dowd, ‘The Man Question’, 114.

¹⁷³ *Ibid.*

¹⁷⁴ Collier and Sheldon, ‘Fragmenting Fatherhood’, 210; Collier, ‘Masculinity, Law and the Family’, 202.

¹⁷⁵ Examples of correlational studies emphasising the importance of distinctive maternal and paternal roles include H. Biller, *Father, child and sex role* (Heath, 1971); H. Biller, *The father factor* (Pocket books, 1994); D. Popenoe, *Life without fathers* (Free Press, 1996).

¹⁷⁶ D. Blankenhorn, *Fatherless America* (Basic Books, 1995).

¹⁷⁷ *Ibid.* On the issue of ‘generativity’, namely the importance and the benefits of fatherhood for men, see J. Snarey, *How Fathers Care for the Next Generation: A Four-Decade Study* (Harvard University Press, 1993). Similarly,

masculinity has been presented as a catalyst for a cycle of maladjusted children.¹⁷⁸ Fatherless children, especially boys, seemed to have problems in relation to gender identity development, educational achievements,¹⁷⁹ psychological adjustment and controlling aggression.¹⁸⁰ Hence, the absence of a properly engaged father has begun to be seen as a social problem in relation to which State intervention ought to be accepted.

In Britain, for instance, the attempt to promote father-inclusive practices in service provision and service delivery materialized in various legislative acts such as the Childcare Act 2006, the Equality Act 2006 and policy documents such as Every Parent Matters and the National Service Frameworks.¹⁸¹ Through these initiatives, healthcare providers and local authorities have been strongly encouraged to provide fathers with the support and opportunities they need to effectively fulfil their parental role, regardless of the degree of involvement in their children's care.¹⁸² Similarly, efforts to promote paternal engagement have commonly resulted in joint custody and other shared parenting measures aimed at putting biological fathers on an equal footing, regardless of their marital status and demonstrated commitment to parenting.¹⁸³ Along these lines, also the adoption of more stringent enforcement mechanisms to collect child support has been explicitly invoked as necessary to achieve male presence and male responsibility towards the family, with the ultimate aim of connecting men with their children.¹⁸⁴ Clearly, behind the State's effort of enforcing fatherhood was also the intention to minimise public expenditures and support among single-mothers and, more generally, to promote "'trickle-down' and 'personal responsibility'" instead of "public provision and social citizenship" in a time of rising neoliberalism.¹⁸⁵

Dowd argues that, in addition to fostering the best interests of the child, a nurture-based definition of fatherhood has value for fathers. In particular, she explains that nurture not only contributes to the development of adult men, but it also allows them to choose among different ways of being men. See N. Dowd, 'Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers' 2005 54 *Emory Law Journal* 1326.

¹⁷⁸ Among father-absence studies, see P. Adams, J. Milner and N. Schrepf, *Fatherless children* (Wiley, 1984); R. Hergoz and C. Sudia, 'Children in fatherless families' in B. Caldwell and H. Ricciuti (eds.), *Review of Child Development Research* (University of Chicago Press, 1973).

¹⁷⁹ D. Epstein, J. Elwood, V. Hey and J. Maw, *Failing Boys? Issues in Gender and Achievement* (Open University Press, 1998).

¹⁸⁰ M. Lamb, 'How Do Fathers Influence Children's Development? Let Me Count the Ways' in M. Lamb (ed.), *The Role of the Father in Child Development* (Wiley, 2010), 5.

¹⁸¹ Collier and Sheldon, 'Fragmenting Fatherhood', 22.

¹⁸² *Ibid.*

¹⁸³ M. Fineman, 'Fatherhood, Feminism and Family Law' 2000-2001 32 *McGeorge Law Review* 1036.

¹⁸⁴ *Ibid.*

¹⁸⁵ N. Fraser, 'Feminism, Capitalism and the Cunning of History' March-April 2009 56 *New Left Review* 107. On this, see also M. Fineman, 'Contract and Care' 2001 76 *Chicago-Kent Law Review* 1403-1440.

In the 1980s, a number of researchers attempted to measure the effects of increased paternal involvement on children. Most of these studies relied on a comparison between the status of children in traditional families and that of children raised primarily by their fathers or co-parented by their mothers and fathers.¹⁸⁶ Results indicated increased cognitive competence, increased empathy and decreased sex-stereotyped beliefs among the children with involved fathers.¹⁸⁷ It is important to note that, in all these studies, paternal involvement in childcare corresponded to the desire of the fathers themselves and their partners.¹⁸⁸ Therefore, research shows that fathers must be looked at within the broader familial environment: positive father-child relationships are more likely to exist when fathers establish and maintain positive relationships with their partners, former partners and other children.¹⁸⁹

Moreover, comparisons between children brought up in two-parent heterosexual families and children brought up in two-parent lesbian families fail to detect differences in the advantage of the former.¹⁹⁰ Accordingly, it seems to be the value of co-parenting – rather than the fathering on its own – that produces positive child outcomes. Socialisation studies have cogently proved that parental nurture, affection and closeness result in positive child outcomes regardless if the parent involved is a mother or a father.¹⁹¹ Mothers and fathers influence children by their nurture, not by their gender.¹⁹² The features of a father as a parent appear much more influential than the features of a father as a male adult. Therefore, the implications of absent fathers do not resonate with the absence of a key gender piece but rather with the loss of financial and co-parenting contribution.¹⁹³ Nonetheless, judges have often used considerable discretion to produce and replicate their own convictions about ‘appropriate’ parental practices.¹⁹⁴ Throughout the twentieth century, for

¹⁸⁶ For instance, see M. Lamb, J. Pleck and J. Levine, ‘The role of the father in child development: the effects of increased paternal involvement’ in B. Lahey and A. Kazdin (eds.), *Advances in Clinical Child Psychology* (Plenum, 1985); N. Radin, ‘Primary caregiving fathers in intact families’ in A. Gottfried and A. Gottfried (eds.), *Redefining families: Implications for children’s development* (Plenum, 1994).

¹⁸⁷ *Ibid.*

¹⁸⁸ Lamb, ‘How Do Fathers Influence Children’s Development?’, 2.

¹⁸⁹ *Ibid.*, 11.

¹⁹⁰ J. Pleck, ‘Fatherhood and Masculinity’ in M. Lamb (ed.), *The Role of the Father in Child Development* (Wiley, 2010), 47.

¹⁹¹ Lamb, ‘How Do Fathers Influence Children’s Development?’, 11.

¹⁹² Dowd, ‘Redefining Fatherhood’, 45.

¹⁹³ Lamb, ‘How Do Fathers Influence Children’s Development?’, 12.

¹⁹⁴ *Ibid.*

instance, the view that families need fathers to ensure the social, psychological and economic wellbeing of all its members has informed judicial opposition to single motherhood.¹⁹⁵

4. The Dominant Ideology of the Family under Challenge

The concept of ‘family’ has given rise to abundant literature emerging from different disciplinary perspectives. These studies have cogently demonstrated that family structures and functioning have varied throughout time and that family is attributed different meanings in different contexts. Historical studies of the family have attempted to detect and describe historical shifts in household structures.¹⁹⁶ In so doing, this body of knowledge has emphasised the malleability of the roles of women and men in the family and, indirectly, offered some suggestions as to the changing nature of familial masculinity throughout history. It follows that the family is not a pre-given site where men and women arrive and live as fixed gender subjects.¹⁹⁷ Rather, it is subject to both historical and contextual/cultural variations that, in turn, constitute dynamic forces in the social construction of ideas of men and women.¹⁹⁸

Although there is no one transhistorical family form, the existence of a ‘dominant ideology of the family’ and, therefore, a traditional (as well as idealised) model of family is undeniable. The expression ‘dominant ideology of the family’ is used by Claire McGlynn to describe “the ideal against which other family forms and practices are measured”,¹⁹⁹ and it implies a set of structural/physical as well as functional features.²⁰⁰ First of all, it refers to a “white, heterosexual, married couple, with children, all living under the same roof” and, as such, resonates with the

¹⁹⁵ Collier, ‘Masculinity, Law and the Family’, 201.

¹⁹⁶ *Inter alia*, E. Shorter, *The Making of the Modern Family* (Basic Books, 1975); R. Fletcher, *The Family and Marriage in Britain* (Penguin Books, 1977); L. Davidoff and C. Hall, *Family Fortunes: men and women of the English middle class 1780-1850* (Hutchinson, 1987).

¹⁹⁷ Collier and Sheldon, ‘Fragmenting Fatherhood’, 33.

¹⁹⁸ *Ibid.*

¹⁹⁹ C. McGlynn, *Families and the European Union – Law, Policy and Pluralism* (Cambridge University Press, 2006), 23.

²⁰⁰ Before McGlynn, Katherine O’Donovan elaborated on the familial ideology that contributes to preserving a hierarchy of family forms. See K. O’Donovan, *Family Law Matters* (Pluto Press, 2003). Referring to Britain in the 1990s, O’Donovan extracted the content of the ideology of the family from the statements of politicians and of the judiciary. According to her investigation, this ideology viewed the family “as the bedrock of traditional values and common sense”, “the emblem of stability, reassurance”, “place of love and security” (pages 39 and 41).

image of the 'sexual family', using Martha Fineman's terminology.²⁰¹ In fact, although less emphasised in McGlynn's theory, the shared assumption is that the ideal – or, 'natural' – family originates from and revolves around a formally celebrated adult sexual affiliation.²⁰² In addition to these formal characteristics, the dominant ideology of the family endorses and perpetuates as 'natural' a gendered division of labour, according to which "the husband is the main breadwinner and the wife the primary caregiver of children and other dependants".²⁰³

The 'dominant ideology of the family' inevitably produces and perpetuates stereotypes, which do not always reflect reality, about the 'normal' family type and the 'proper' roles of men and women within families. The obsession with the traditional family has gone as far as to conceive untraditional different family arrangements to be dangerous to society and implicated in the fall of fundamental values.²⁰⁴ The influence of this ideology has permeated and continues to permeate the formulation and application of law and policy worldwide.²⁰⁵ By supporting the image of what is considered an appropriately constituted family, the law identifies the normal and, as a consequence, the deviant.²⁰⁶ As such, the law functions as a potentially coercive and punitive entity in the lives of people whose circumstances and desires do not comply with the norm.²⁰⁷

Over the last fifty years, however, a series of substantial transformations have occurred in relation to both the structure and the functioning of families in Western societies. Possibly, the most far-reaching of these is exemplified by the heightened dissolution of the previously coextensive family practices of sex, marriage and parenthood.²⁰⁸ It is possible to detect four main developments as catalysts for this shift: (1) medical progress and the advent of assisted reproductive technologies ('ART'); (2) the decline in marriage as a life-long commitment to one person, the liberation of divorce processes and a concomitant increase in extra-marital cohabitation and child-bearing; (3) increasing rates of women participating in the workforce and their

²⁰¹ Along the same lines, while analysing the law's role in privileging one particular family form, O'Donovan describes the 'idealised' family as the nuclear family, based on a heterosexual marriage, headed by the husband and father. See O'Donovan, 'Family Law Matters', 30-31.

²⁰² M. Fineman, 'The Sexual Family' in M. Fineman, J. Jackson and A. Romero (eds.), *Feminist and Queer Legal Theory – Intimate Encounters, Uncomfortable Conversations* (Ashgate, 2009), 48.

²⁰³ McGlynn, 'Families and the EU', 23.

²⁰⁴ Fineman, 'The Sexual Family', 47.

²⁰⁵ D. Gittins, *The Family in Question – Changing Households and Familiar Ideologies* (Macmillan, 1993), 2-3; Fineman, 'The Sexual Family', 46; O'Donovan, 'Family Law Matters', chapter 3.

²⁰⁶ Fineman, 'The Sexual Family', 46.

²⁰⁷ *Ibid.*

²⁰⁸ Collier and Sheldon, 'Fragmenting Fatherhood', 234.

continuing engagement in paid employment after childbirth; and (4) the growing social acceptance and legal recognition of same-sex partnerships and, although at a slower pace, the expanding possibilities for them to become parents and to be legally-recognised as such.

Around the same time, theorists of the family began to talk about the ‘fragmented family’. Smart and Neale, *inter alia*, have explained how broad demographic shifts, like the ones above, have resulted in an increasing split of biological families into different households, marriages and cohabitations.²⁰⁹ Already in 1991, Hill observed that:

We now live in an era where a child may have as many as five different “parents”. These include a sperm donor, an egg donor, a surrogate or gestational host, and two non-biologically related individuals who intend to raise the child.²¹⁰

It is self-evident that the pair reproduction-parenthood is at risk of separation as a result of modern reproductive techniques. In fact, such techniques allow for the “depersonalization”²¹¹ of the procreation process: the biological contribution can be split from the social context of interpersonal relationships and, therefore, there are more than two individuals who could claim the status of legal parenthood. Although enhancing the role of personal intention in procreation and parenthood, the new biological and social realities created by assisted reproductive technologies inevitably question old assumptions, sometimes embedded in legal norms. For instance, the rule *mater semper certa est* has lost its absolute character in the face of surrogacy options. Similarly, techniques involving the donation of male gametes challenge the accuracy of the so-called marital presumption, according to which the husband of the child’s mother is the father of any child born within marriage.

²⁰⁹ C. Smart and B. Neale, *Family Fragments?* (Polity Press, 1999), 181. They have also spotted the risk of overstressing the degree of transformation and diversity that characterise family life. Although referring to marriage and divorce statistics from the early-mid 1990s in Britain, Smart’s and Neale’s observations might remain applicable to current data. Firstly, they point out that rising cohabitation rates might not necessarily resonate with the decline in marriage but simply with its postponement. Secondly, they underline the importance of taking into account the sectors of society that are featured in the statistics and those more invisible groups which are not, e.g. ethnic minority communities. See Smart and Neale, ‘Family Fragments?’, 182.

²¹⁰ J. Hill, ‘What Does it Mean to be A “Parent”? The Claims of Biology as the Basis for Parental Rights’ 1991 66 *New York University Law Review* 355.

²¹¹ M. Shultz, ‘Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality’ (1990) *Wisconsin Law Review* 300.

The decline in marriage as a once-and-for-all commitment and the concomitant rising number of extra-marital births entail equally profound disconnections between marriage, reproduction and parenthood. Divorce clearly represents the context where the fragmented nature of biological families and parenting practices reaches its peak in terms of practical visibility. Despite some increase in the numbers of non-resident mothers, parental separation and divorce generally entail a progressive alienation of biological fathers from the lives of their children.²¹² At the same time, should the child's mother remarry, her new partner might choose to act as a stepfather, thus representing a new or an additional source of paternal care to the child. Therefore, the fragmentation resulting from separation or divorce is twofold: physical separation of members of the nuclear family into two or more households, in conjunction with a split of parental functions between more than two adults.

Over the last two decades, the two-earner family has progressively established itself as the norm in both Western Europe and the United States.²¹³ This societal shift has the potential to upset the traditional organisation of labour along gendered lines and, therefore, to challenge the enduring and undisputed role of men as breadwinners and women's longstanding primary involvement in childcare. Therefore, in such scenarios, fragmentation signifies splitting traditional tasks and responsibilities, which have been historically performed by one gender, between two genders. The implications of greater participation of women in paid employment, more or less successfully, goes beyond the gender divide: although it does not automatically amount to increased paternal involvement in the traditionally maternal sphere of childcare, it certainly implies a more equal economic contribution between mothers and fathers (pay-gap aside).

If compared to these recent shifts, the progressive opening of the family avenue to same-sex couples has offered the chance to rethink the dominant ideology of the family in a more holistic manner. Heterosexuality being the prerequisite of natural reproduction and, in most jurisdictions, of marriage, the departure from the opposite-sex paradigm automatically triggers two further 'deviances': in fact, in addition to being naturally insufficient to lead to conception, a homosexual affiliation remains widely unsusceptible to any formalisation. Therefore, in the domain of homosexuality, the conventional continuum between sex, marriage and parenthood is often broken

²¹² S. Kiely, 'Mothers are non-resident parents too: a consideration of mothers' perspectives on non-residential parenthood' (2005) 27(1) *Journal of Social Welfare and Family Law* 1-16.

²¹³ Hobson and Morgan, 'Introduction', 3.

in multiple ways: neither sex nor parenthood are likely to take place within a marital union, parenthood does not always follow from biology.

Despite these demographic shifts and decades of organised women's movements, the sexual family remains "the most gendered of our social institutions".²¹⁴ This holds true even if – at least, on paper – the current legal system provides for, *inter alia*, easy access to divorce as well as for flexible working arrangements, including maternity leave provisions. As a consequence, to the extent that these possibilities are effectively offered, women can freely decide to terminate a marital relationship with their partner or never formally create one.²¹⁵ As a corollary, the choice of becoming a mother is no longer dependent on the existence of a formalised union. Along these lines, such things like the career/motherhood dichotomy become mere memories that can be traced to a time of patriarchy. Rather, women nowadays are allegedly free to combine public and private commitments and even to discard any tradition/culture-imposed 'female' role.

However, these transformations have not been attained without a price. The requirement of paid work for all women failed to accommodate the gendered lives of most women and, therefore, ended up harming the most disadvantaged mothers, rather than empowering them.²¹⁶ Although the law no longer contains formally different expectations for mothers and fathers, often it does no more than simply pay lip service to the value of substantive and, even more so, transformative equality.²¹⁷ As a result, using Fineman's words, "Mother is neutered into Parent", but only within the law.²¹⁸ However, her significance and positive role in childcare remain at the societal level.²¹⁹

²¹⁴ Fineman, 'The Sexual Family', 49.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ Although issues related to equality will be discussed later in this chapter, within the framework of the ECtHR jurisprudence, it is worth anticipating that equality has been traditionally defined as a dyadic concept. In its formal version, equality is synonymous with non-discrimination and leads to a mere requirement of sameness of treatment between different social classifications. See Fineman, 'Beyond Identities', 1729. A substantive model of equality, instead, is based on the belief that "equal considerations for all may demand very unequal treatment in favour of the disadvantaged". See A. Sen, *Inequality Re-examined* (Oxford University Press, 1992). Therefore, it does not focus on status *per se*, but rather on those individuals and groups who experience disadvantage as a result of status-based discrimination. More recently, a third version of equality has been conceptualised: transformative equality. As defined by Timmer, equality as transformation "challenges the deeply ingrained gender roles and gendered ideology on which society is based". See A. Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' 2011 11(4) *Human Rights Law Review* 712.

²¹⁸ Fineman, 'The Neutered Mother', 660.

²¹⁹ *Ibid.*, 662.

Possibly, one of the main reasons behind the failed attempt to free women from a historically defined ‘female’ role lies in the absence of a concomitant reconsideration and reconstruction of the institution of fatherhood outside fixed gender roles.²²⁰ In fact, despite endorsing the rhetoric that all parents – mothers as well as fathers – will take care of their children, the climate of debate generated by ongoing changes in family practices did not necessarily inspire indepth reflections on what being a father concretely entails or ought to entail in today’s society and, more importantly, what forces and dynamics impede greater paternal involvement in childcare and family work. Consequently, it has often ignored the conceptual and practical implications of not questioning the institution of fatherhood when re-envisioning gender equality. Rather, the primary preoccupation has often been to ensure a greater participation of women in the public sphere and, paradoxically, limited efforts have been spared to address longstanding inequalities within the private sphere of parenthood.

5. Defining Conventional Fatherhood

Many commentators have underlined how difficult it is to define who is a father.²²¹ In line with research conducted by family historians, any study on fatherhood and the definition of the concept itself owes much to the particular social, cultural and economic circumstances that produce the norms moulding the behaviour of fathers.²²² As a result, fatherhood is not a unitary, static or ‘natural’ concept. Rather, fathers and fatherhood are widely considered social constructions and institutions.²²³

For the purposes of the present research, I have coined the definition of conventional fatherhood. ‘Conventional’ is defined as “based on or in accordance with what is generally done

²²⁰ Fineman, ‘The Neutered Mother, the Sexual Family’, 201.

²²¹ R. Day and M. Lamb (eds.), *Conceptualizing and measuring father involvement* (Lawrence Erlbaum, 2004), 2.; L. Roggman, H. Bradley and H. Raikes, ‘Methodological, measurement and design issues in studying fathers: An interdisciplinary perspective’ in C. Tamis-LeMonda and N. Cabrera (eds.), *Handbook of father involvement: Multidisciplinary perspectives* (Lawrence Erlbaum, 2002), 2-4.

²²² For instance, see R. LaRossa, *The Modernization of Fatherhood: A Social and Political History* (University of Chicago Press, 1997); Ruddick, ‘The Idea of Fatherhood’, 207; Day and Lamb, ‘Conceptualizing and Measuring Father Involvement’, 2.

²²³ For instance, Sevenhuijsen describes fatherhood as a construction of family aimed to connect children with men. See S. Sevenhuijsen, ‘Mothers as citizens – Feminism, evolutionary theory and the reform of Dutch family law 1870-1910’ in C. Smart (ed.), *Regulating Womanhood – Historical Essays on Marriage, Motherhood and Sexuality* (Routledge, 1992), 186. See also, J. Hearn, ‘Men, fathers and the state’, 245.

or believed”²²⁴ and, within the current context, should be intended as synonymous with ‘traditional’ and ‘dominant’. Therefore, ‘conventional fatherhood’ is a legal definition of fatherhood based on expectations, presumptions and prescriptions about the ‘good’ or ‘proper’ father that are embedded in the dominant culture. Here, ‘conventional fatherhood’ is used to refer to the individual who has those features – both physical and behavioural emotional – and/or plays a role, which are conventionally tied to the father figure. As anticipated, I draw these characteristics from the ‘dominant ideology of the family’, as conceptualised by McGlynn. For present purposes, four conventional features of fatherhood can be detected: a biological tie with his child, a marital or otherwise sexual relationship with the child’s mother, economic provision, and heterosexuality. A fifth characteristic can be added; it lies in the unitary nature of conventional fatherhood and, therefore, in the coexistence of all those features within the same individual.

My definitional framework stems from a law and society perspective, which rests on the interpenetration of law and society. Firstly, it captures the “influence on law of forces outside the box” of legal logic.²²⁵ The term ‘conventional’ renders visible the often blurred boundaries between law, culture and society and testifies to the influence of the dominant culture on the legal regulation of fatherhood. Secondly, the idea of conventional fatherhood also incorporates the basic view characteristic of ‘law and society’ that law is everywhere, not just in legislation and judicial decisions.²²⁶ Law pervades every dimension of our life, in terms of choices and behaviour, to the extent where ‘law’ and ‘society’ become almost superfluous.²²⁷ Moreover, the legal construction of conventional fatherhood tends to express a vision of the ‘proper’ father and, indirectly, of the appropriately constituted family.²²⁸ Consequently, it defines the normal and the deviant.²²⁹ While normality is generally endowed with greater legal entitlements, deviancy is generally sanctioned with lack of recognition and support.²³⁰

²²⁴ Oxford Dictionaries, online at <http://www.oxforddictionaries.com/definition/english/conventional> (last access on 11 May 2015).

²²⁵ K. Calavita, *Invitation to Law and Society – An Introduction to the Study of Real Law* (University of Chicago Press, 2010), 4.

²²⁶ *Ibid.*, 5; M. Travers, *Understanding Law and Society* (Routledge, 2010), 3.

²²⁷ Calavita, ‘Invitation to Law and Society’, 5.

²²⁸ Fineman, ‘The Sexual Family’, 46.

²²⁹ *Ibid.*

²³⁰ B. Feuillet-Liger, ‘Preface’ in B. Feuillet-Liger, T. Callus and K. Orfali (eds.), *Reproductive Technology and Changing Perceptions of Parenthood around the world* (Bruylant, 2014), 20. She argues that “through the law, society labels as family something it wants to establish as an institution leaving the rest in the domain of privacy, something outside of the law”.

In stark contrast with the ideology of ‘conventional fatherhood’, Collier and Sheldon have observed that the abovementioned fragmentation of families is a profoundly gendered phenomenon:²³¹ it has signified and continues to signify, to a great extent, a fragmentation of fatherhood.²³² Overall, ‘fragmented fatherhood’ embodies the male/father-specific effects of the fragmentation of the family, as envisaged by Smart and Neale, and it manifests itself in multiple ways. The intact nuclear family is less widespread than it used to. Separation and divorce imply further parties involved and, therefore, further complexities. Given the proliferation of ‘step’, ‘blended’ or ‘binuclear’ families,²³³ it is very likely that children will have to live and be nurtured in more than one household during their childhood and adolescence, thus establishing bonds with more than two parental figures. This is why divorced fathers, who seek to obtain custody of their children, often find themselves in conflict with re-partnered fathers claiming rights over their non-biological children.²³⁴ In addition to private parties, the State has its own public interests to pursue as well as a key role to play in relation to the organisation of care and cash provision.²³⁵

Therefore, in its first meaning, ‘fragmented fatherhood’ stands for the split of conventional paternal features and roles among two or more men.²³⁶ This, in turn, is often accompanied by a relocation of family members across different physical and social spaces. Reconstituted families provide a very good example of how a child can benefit from all aspects of fatherhood as a result of the involvement of more than one man in their lives. In such context, the source of biology does not necessarily coincide with the source of economic provision, which might be primarily provided by the step-father (child support aside). Moreover, if the reconstituted family is marriage-based, the biological link and the marital ties are offered by two distinct men: the divorced father and the step-father, respectively. In Collier’s and Sheldon’s view, fragmented fatherhood also resonates with the lived experience of those non-resident fathers who see their time with their children, divided into time-slots, and these care arrangements being rigidly enforced.²³⁷

²³¹ Collier and Sheldon, ‘Fragmenting Fatherhood’, 87.

²³² *Ibid.*, 4; S. Sheldon, ‘Fragmenting Fatherhood: The Regulation of Reproductive Technologies’ 2005 68(4) *Modern Law Review* 527.

²³³ M. Coleman, L. Russel and L. Ganong, ‘Blended and binuclear families’ in R. Emery (ed.), *Cultural sociology of divorce: An encyclopedia* (Sage Publications, 2013), 141-147.

²³⁴ Hobson and Morgan, ‘Introduction’, 2.

²³⁵ *Ibid.*, 11.

²³⁶ Collier and Sheldon, ‘Fragmenting Fatherhood’, 5

²³⁷ *Ibid.*

Furthermore, empirical research involving fathers seems to suggest that the idea of ‘fragmented fatherhood’ reflects their own perception of what fatherhood means and what it entails.²³⁸ Ives’ work, for instance, pointed out that fatherhood is often used as a fragmented and confused concept, to indicate a variety of different roles and relationships.²³⁹ The idea that there exist multiple types of fathers, each undertaking a specific role, appears to lie at the core of men’s understandings of fatherhood.²⁴⁰ Among this variety of fathers, the predominant narrative constructs fatherhood as a dyadic concept: ‘father as progenitor’ and ‘father as carer’.²⁴¹

Apart from resulting in a practical and conceptual fragmentation, the suggested subdivision of fatherhood has a legal dimension. Therefore, an additional interpretation of ‘fragmented fatherhood’ might refer to the legal responses to changing social realities and, more specifically, to a legal recognition of the evolving and heterogeneous nature of men-child relationships.²⁴² Referring back to the four sociological developments previously mentioned, it has been argued that the law has often shown remarkable contradictions in its way of dealing with them, thus prioritising different relationships at different times.²⁴³ As explained by Smart and Neale, however, these inconsistencies should not be viewed as evidence of disorganised legal thinking but rather of the complexity of current family practices, which can no longer fit into neat definitions.²⁴⁴

Despite these contradictions, some commentators have also observed that family law has gradually begun to appreciate each route to fatherhood as equally legitimate and the role played by each father as equally fundamental.²⁴⁵ This shifted legal attitude can certainly be understood as an inevitable consequence of the abovementioned four demographic changes. In the same way as the family has been impacted by these shifts, family law could not remain unchanged.²⁴⁶ The traditional channels through which men have established legal relationships with children, such as marriage and biology, have ceased to act as immediate connectors. As a result, family law has been

²³⁸ *Ibid.*

²³⁹ J. Ives, *Becoming a Father/Refusing Fatherhood: How Paternal Responsibilities and Rights are Generated*, PhD thesis submitted to the University of Birmingham (July 2007), 179.

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*, 180.

²⁴² Collier and Sheldon, ‘Fragmenting Fatherhood’, 5.

²⁴³ Smart and Neale, ‘Family Fragments?’, 183.

²⁴⁴ *Ibid.*

²⁴⁵ Ives, ‘How Paternal Responsibilities and Rights are Generated’, 180; Sheldon, ‘The Regulation of Reproductive Technologies’, 530.

²⁴⁶ Smart and Neale, ‘Family Fragments?’, 184.

forced to develop alternative legal rules to regulate father-child relationships. For instance, in the face of high divorce rates and increasing numbers of children born out of wedlock, family law has shown certain flexibility in responding to the fragmentation of fatherhood by resorting to biology as the factor linking unmarried and divorced fathers with their children. Therefore, within national legal systems, *de facto* relationships and divorce have sometimes resonated more with the beginning of biology-based relationships than with the end of the marital family.²⁴⁷

As a result, there is no one fatherhood model in family law; neither two nor three. The question ‘who is a father in law?’ can be more accurately addressed if divided into a set of narrower questions, including: who should be named on the birth certificate? Who should be granted contact rights and parental responsibility? Who should be responsible for financially providing for the child?²⁴⁸ The regulation of fatherhood can no longer benefit from a one-size-fits-all approach; rather, it requires the law and courts to navigate the complex reality of fragmented fatherhood, thus recognising the many and shifting nuances of fatherhood as a practice and as a culture and, if necessary, the contribution of multiple ‘fathers’ in a child’s life.

6. Fragmented Fatherhood and the Structure of the Analysis

The primary aim of the present study is to assess whether and, if so, to what extent the dominant ideology of fatherhood or the ‘conventional’ definition of fatherhood continues to apply or is being challenged within the jurisprudence of the ECtHR. In other words, this thesis seeks to understand whether and, if so, how the Court has reacted to the fragmentation of fatherhood, as a practical reality brought about by the abovementioned broad demographic changes, and navigated the inevitable complexity and diversity of father-children relationships. Therefore, the following analysis attempts to reveal whether the Court has embarked on an adjustment process or on a transformative process; in other words, whether the Court conceives the law as either a reflective tool or a transformative tool, at two different levels. Firstly, it will be considered whether the Court employs the law as a means of combatting gender stereotypes and establishing a new definition of fatherhood or, alternatively, of reflecting and compensating for existing gendered dynamics of work and parenting; secondly, whether the interpretation of the Convention is intended to mirror

²⁴⁷ Sheldon, ‘The Regulation of Reproductive Technologies’, 528.

²⁴⁸ *Ibid*, 530.

national legal systems or to impose new legal conditions, whenever the Court feels that fundamental rights could be protected in a more dynamic way. Thus, for current purposes, the dilemma of adjustment *versus* transformation concerns the interactions between the Court, as an international court, and the Contracting States as well as the broader relationship between law (the Convention) and social change.

The focus on fatherhood, as developed in the present study, should be seen as a means to an end as well as to an end in itself. It has been rightly argued that considering fatherhood in isolation or fathers' rights as independent from the need of positive relationships with children and their mothers entails the risk of reiterating or reproducing gender inequalities, while empowering fathers.²⁴⁹ Therefore, when defining fatherhood, it is essential to consider the consequences for the best interests of the child as well as for women's ambitions, wishes and investments with respect to both paid work and parenting.²⁵⁰ This operation can entail high levels of intricacy since the different parties involved might pursue conflicting interests.

For instance, while the preservation of contact between the father and the child might ensure the respect for both parties' family life as well as the best interests of the child, it might – at the same time – confront mothers' authority in relation to their children and force them to remain part of a relationship that is no longer desired, for instance in the aftermath of parental separation or after a brief sexual encounter.²⁵¹ In light of this, one of the sub-questions addressed by this thesis is whether and, if so, to what extent the Court takes the complexity triggered by the need to give due consideration to all parties involved into account. Therefore, the thesis will investigate, among other things, the Court's departure from the conventional paradigm of fatherhood and, consequently, new emerging understandings of fatherhood, as they pertain to three distinct but interrelated aspects: the best interests of the child; a father's right to be free from gender stereotypes (and, therefore, the promotion and protection of the father's right to respect for private and family life); and women's equality.

²⁴⁹ N. Dowd, 'From genes, marriage and money to nurture: redefining fatherhood' (2003-2004) 10 *Cardozo Women's Law Journal*, 144. Dowd emphasizes the requirement of cooperative parenting with other nurturers as an integral component of her redefinition of fatherhood around nurture. In her understanding, cooperative parenting does not presuppose the sharing of a household and, therefore, shall survive separation/divorce. Moreover, she underlines that cooperative parenting does not rest on an exclusive model of parenthood; rather, it is compatible with multiple parenting figures contributing to the best interests of the child. See Dowd, 'Fathers and the Supreme Court', 1315-1316.

²⁵⁰ Dowd, 'From genes', 144.

²⁵¹ Collier and Sheldon, 'Fragmenting Fatherhood', 230.

The structure of the jurisprudential analysis is defined by the four sociological developments previously mentioned, namely: (1) ART; (2) the decline in marriage as a life-long commitment to one person and a concomitant increase in extra-marital cohabitation and child-bearing; (3) increasing rates of women participating in the workforce and their continuing engagement in paid employment after childbirth; and (4) growing social acceptance and legal recognition of same-sex partnerships and, although at a slower pace, expanding possibilities for them to become parents and to be legally recognised as such. Accordingly, the Court's reliance on conventional features of fatherhood when determining the allocation of the status of legal father and/or parental rights will be assessed within the following case-law domains: filiation and parental rights following the employment of ARTs; right to custody and/or contact of divorced and unmarried fathers; family-work reconciliation; and filiation and parental rights of homosexual individuals and couples. These areas have been selected by virtue of their ability to directly confront the Court with the various factual consequences of 'fragmented fatherhood'.

Bearing in mind the overarching goal to investigate the ECtHR's degree of attachment to or deviation from a conventional model of fatherhood, each case-law domain is particularly important to reveal the decisiveness attributed to one specific conventional feature when establishing who is the legal father of a child and/or deciding who deserves the attribution of parental rights. This can be explained by the fact that, in addition to triggering an overall fragmentation, the four developments above have more targeted implications. More specifically, each of them has the potential to undermine the persistence of a specific feature as the basis for allocating the legal status of fatherhood and/or specific parental rights, thus offering a valuable opportunity for questioning a factor's current validity as a parameter of legal fatherhood. Therefore, whilst testing the relevance of the traditional ideology of fatherhood, more generally, the analysis of each domain will elaborate more closely on the endurance of the conventional features of fatherhood, which are most strongly challenged by the demographic change connected to the domain.

Along the four domains, the unifying question is whether and, if so, under what circumstances the ECtHR felt prepared to depart from the conventional ideology of fatherhood. Although the impact of each sociological shift on the conventional definition of fatherhood will be explored in-depth in the following chapters, a couple of preliminary remarks seem necessary to clarify how the main research question plays out in the different jurisprudential domains.

In the context of ART, aspects of conventional fatherhood are shared between at least two men: the sperm donor and the intended father. The possibility of outsourcing reproduction inevitably jeopardises the conventional cause-effect relationship existing between biological relatedness and the status of legal father; hence, the tenacity of biology as a defining feature of legal fatherhood. Therefore, the jurisprudential analysis in Chapter 2 will attempt to establish whether and, if so, to what extent the ECtHR has seized the advent of ART as an opportunity for departing from a biological definition of fatherhood. More specifically, it seems interesting to investigate whether biology remains an indispensable and/or sufficient ground for legal fatherhood or, on the contrary, it requires the existence of other supporting factors.

Differently, divorce and, even more so, *de facto* relationships pose a severe challenge to the traditional marriage-fatherhood pairing. As argued by Fineman, the family has been traditionally conceived as an institution of primarily horizontal relationships, grounded on the sexual affiliation between one man and one woman.²⁵² As a consequence, the parent-child relationship has tended to be defined and regulated as a derivative of the relationship between the parents. It is worth remembering that children used to be labelled ‘legitimate’ or ‘illegitimate’ depending on whether the parents were married. The growing prevalence across Europe of single-mother families constitutes an unequivocal sign that fathers, after relationship breakdown, typically cease to reside with their children and, consequently, find themselves parenting at a distance, or not at all.²⁵³ At the same time, should the child’s mother remarry, her new partner might choose to act as a stepfather, thus representing a new or an additional source of paternal care to the child. As a result, Chapter 3 will seek to determine whether and, if so, under what circumstances, biological unmarried fathers and divorced fathers are considered meritorious of contact and/or custody rights; whether, in light of marriage’s diminished popularity and duration, the Court has begun to rely on a new criterion to regulate post-separation relationships between divorced and/or unmarried fathers and their children; and, finally, whether and, if so, on what grounds other father figures – such as, stepfathers – are granted rights of fatherhood.

As previously observed, homosexual relationships entail the disaggregation of the conventionally coextensive practices of sex, marriage and parenthood in the most comprehensive

²⁵² Fineman, ‘The Neutered Mother’, 664; Fineman, ‘The Sexual Family’, 46.

²⁵³ B. Simpson, J. Jessup and P. McCarthy, ‘Fathers after Divorce’ in A. Bainham (ed.), *Children and their Families: Contact, Rights and Welfare* (Hart, 2003), 201.

possible manner. Thus, it is no coincidence that gay fatherhood remains the most insidious stumbling block in the Court's path toward expanding the boundaries of 'family life'. The case-law analysis included in Chapter 5 will, *inter alia*, assess whether the Court allows itself to profitably build upon its own jurisprudential developments achieved in the ART and post-separation/extra-marital fatherhood domains. More explicitly, it will explore whether any degree of deviation from conventional fatherhood manifested in relation to heterosexual fathers will be maintained within the jurisprudence concerning homo-parenthood or whether the absence of the basic feature of heterosexuality renders the Court's previous progress void, thus requiring it to start from scratch. Furthermore, it will be interesting to investigate to what extent homosexuality becomes a gendered concept when operating within the context of parenting.

Finally, the increasing proportion of two-waged families potentially marks the end of sole breadwinning fatherhood. Whilst in the previous scenarios traditional paternal features tend to be split between two (or more) men, the implications of a greater participation of women in paid employment, more or less successfully, go beyond the gender divide. Although a more equal sharing of childcare responsibilities between mothers and fathers is far from being guaranteed, economic provision no longer represents a distinguishing feature of fatherhood and its sufficiency for the attribution of parental rights – in particular, the right to parental leave – comes under heavy attack. Accordingly, the analysis of the jurisprudence concerning family-work reconciliation (Chapter 4) will attempt to establish whether fathers' progressive loss of economic primacy within the family has implied a shift from working productivity to parenting performance as the basis for attributing a right to paternal leave.

The endorsement of a conventional definition on the part of the Court rarely manifests itself explicitly. Blunt statements such as "X does not deserve the legal status of fatherhood because he lacks Y" or "X should have been granted the right to contact by virtue of Y" are sporadic. Therefore, the envisaged investigation requires the employment of a fundamental methodological tool of feminism, which consists in "unmasking gender biases or assumptions" made by the law and, having regard to the present study, underlying the Court's jurisprudence pertaining to fatherhood.²⁵⁴ As explained by Levit, "it is a process that involves (...) making gender visible",²⁵⁵ but not only. More generally, it entails digging deep into the reasoning provided by the Court and

²⁵⁴ Levit, 'Feminism for Men', 1054.

²⁵⁵ *Ibid.*

unveiling assumptions based on conventional understandings of fatherhood, including gender-related and non-gender-related. As a result, this thesis embarks on an enterprise of raising-awareness. By bringing to the fore the Court's implicit understanding of what a 'proper/worthy of protection' father involves, the present contribution helps the Strasbourg judges to become more self-aware of the definition of fatherhood that they are supporting and promoting.

Concerning the selection of cases, this has been mostly driven by the jurisprudence that is available. In all case-law domains – with the exception of unmarried post-separation/divorce fatherhood – the number of cases brought by fathers or prospective fathers remains quite limited and, therefore, no need for selection has arisen. Differently, the amount of jurisprudence regarding the legal treatment of unmarried fathers and divorced fathers is considerable. As a result, the cases considered in Chapter 3 represent a small sample of the available case-law and have been chosen on the basis of two primary considerations: time and jurisprudential overturns. Accordingly, the judgments considered either represent the first instance in which the Court – more or less explicitly – expressed its opinion on the validity/sufficiency/insufficiency of one or more factors in determining the allocation of contact/custody rights, or they encapsulate the Court's total or partial departure from its previous view up until its most recent stance on the issue under scrutiny. Accordingly, the whole jurisprudential analysis will seek to track the Court's attachment to conventional fatherhood over time and, *inter alia*, to understand whether certain conventional features have been challenged faster than others.

7. The Role of the Court – Judicial Restraint and/or Judicial Activism?

At over 50 years, the European Court of Human Rights is considered one of the most successful international human rights treaty bodies.²⁵⁶ It has been commended as the motive power of fundamental rights jurisprudence in Europe, reaching out to 47 States and over 800 million people.²⁵⁷ The Court consists of a number of judges equal to the number of Contracting Parties to the Convention. Their appointment involves both Member States and the Parliamentary Assembly

²⁵⁶ A. Follesdal, B. Peters and G. Ulfstein, 'Introduction' in A. Follesdal, B. Peters and G. Ulfstein (eds.), *Constituting Europe – The European Court of Human Rights in a National, European and Global Context* (CUP, 2013), 1; F. Bruinsma and S. Parmentier, 'Interview with Mr Luzius Wildhaber, President of the European Court of Human Rights' 2003 21(2) *Netherlands Human Rights Review* 193; A. Bradley, 'Introduction: The need for both international and national protection of human rights – the European challenge' in S. Flogaitis, T. Zwart and J. Fraser (eds.), *The European Court of Human Rights and its Discontents – Turning Criticism into Strength* (Edward Elgar, 2013), 2.

²⁵⁷ *Ibid.*

of the Council of Europe. Each Member State is required to nominate three candidates, who satisfy the criteria stipulated in Article 21(1) of the Convention: being of “high moral character” and possessing “the qualifications required for high judicial office or be jurisconsults of recognised competence”. The Assembly is then responsible for electing one of the candidates by means of a majority vote.

In a nutshell, the Court is entrusted with setting the minimum standard of protection of human rights in Europe and, at the same time, with “defining the margin within which States can opt for different fundamental balances between Government and individuals”.²⁵⁸ It is argued that the adoption of the ECHR by the Member States of the Council of Europe was premised on the assumption that they would retain their full prerogatives as sovereign states and, therefore, full autonomy of their respective societies, with the sole – but important – exception of the core fundamental rights enshrined in the Convention.²⁵⁹ The ECHR system is therefore the product of a “tidy arrangement”²⁶⁰, which is preserved by the principle of subsidiarity. The latter provides that national authorities are free to choose the measure they deem appropriate to meet the requirements of the Convention, while the Court is responsible for reviewing the compatibility of national choices with the Convention standards. Therefore, the Court is entrusted with the delicate task of ensuring equilibrium between democratic discretion and diversity at the national level, on the one hand, and the universal dimension of the Convention standards, on the other hand.²⁶¹

The interpretation of the ECHR is subject to the rules on the interpretation of treaties, enshrined in the Vienna Convention on the Law of Treaties 1969.²⁶² According to Article 31(1), which represents the general rule of interpretation, “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.²⁶³ As explained by the Court itself, the context against which the Convention has to be interpreted is a treaty for the effective protection of individual human

²⁵⁸ J. Weiler, *The Constitution of Europe – “Do the new clothes have an emperor?” and other essays on European integration* (CUP, 1999), 102-107.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*, 104.

²⁶¹ O. Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff, 2003), 60.

²⁶² D. Harris, M. O’Boyle, E. Bates and C. Buckley, *Law of the European Convention on Human Rights* (OUP, 2014), 7.

²⁶³ Vienna Convention on the Law of Treaties, signed on 23 May 1969, entered into force on 27 January 1980, online at <http://www.oas.org/legal/english/docs/Vienna%20Convention%20Treaties.htm> (last access on 23 January 2015).

rights.²⁶⁴ Having ascertained the ordinary meaning to be given to the words in their context, the Court is therefore required to read the Convention “as a whole” and interpret it “in such a way as to promote internal consistency and harmony between its various provisions”, in accordance with the object and purpose of the treaty.²⁶⁵

Although the Court has *prima facie* approached interpretation as a unitary process (without openly setting a hierarchy among the different criteria for interpretation), reference to the object and purpose of the provision in the context of the Convention has proved the most prominent principle of interpretation resorted to thus far.²⁶⁶ International human rights instruments – just like constitutions – enshrine a set of abstract rights that individuals hold against governments.²⁶⁷ As a result, they face the problem of how the passage of time impacts their interpretation and application.²⁶⁸ This applies to all treaties, whose drafters wished them to be applicable to new circumstances and, therefore, formulated their object and purpose in generic terms.²⁶⁹ Accordingly, international human rights courts – in the same way as constitutional courts – are confronted with the challenge of ensuring due regard to radical and ongoing change in social circumstances, which could not be foreseen at the time of drafting or accession, as they relate to abstract legal provisions.²⁷⁰

Therefore, the general formulations used in the ECHR have been read as disclosing that the Court was not only held responsible for enforcement, but also for developing common human rights.²⁷¹ Furthermore, the impossibility of defining the criteria to be applied through secondary instruments, together with the complexities inherent in the process to amend the Convention, seems to suggest that a certain degree of judicial creativity is not only welcome, but also practically

²⁶⁴ *Saadi v United Kingdom*, Application no. 13229/03, 29 January 2008 (Grand Chamber), para 62.

²⁶⁵ *Ibid.*, para 42.

²⁶⁶ B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (OUP, 2014), 66.

²⁶⁷ *Ibid.*

²⁶⁸ M. Andenas and E. Bjorge, ‘National implementation of ECHR rights’ in A. Follesdal, B. Peters and G. Ulfstein (eds.), *Constituting Europe – The European Court of Human Rights in a National, European and Global Context* (CUP, 2013), 189-190.

²⁶⁹ *Ibid.*, 191; R. Bernhardt, ‘Thoughts on the Interpretation of Human Rights Treaties’ in F. Matscher and H. Petzold (ed.), *Protecting Human Rights: The European Dimension – Studies in Honour of Gerard Wiarda* (Heymanns, 1988), 65-66.

²⁷⁰ Andenas and Bjorge, ‘National Implementation of ECHR Rights’, 191.

²⁷¹ C. Nikolaidis, *The Right to Equality in European Human Rights Law – The quest for substance in the jurisprudence of the European Courts* (Routledge, 2015), 52; P. Mahoney, ‘Judicial Activism or Judicial Self-Restraint in the European Court of Human Rights’ 1990 11 *Human Rights Law Journal* 63.

necessary.²⁷² At the same time, however, a certain amount of judicial restraint appears to be also essential to avoid that the Court's jurisprudence goes too far beyond the situation in the Member States and, thus, to preserve its own legitimacy. Therefore, as summarised by Nikolaidis, the functioning of the Court can be described as "a norm-setting body whose powers are formally restrained by the (widely formulated) letter of the Convention, the (not always clear) state of the consensus among Member States and, finally, the (distant) possibility of amending the ECHR".²⁷³

The need to ensure that human rights are constructed in a dynamic fashion while obeying the principle of subsidiarity is a recurring tension within most of the Strasbourg jurisprudence. According to Mahoney, this tension is "more apparent than real";²⁷⁴ he views judicial activism and judicial restraint as complementary elements of the methodology of judicial review employed by the Court and inherent in the exact nature of the Convention as an international instrument aimed to ensure effective protection of human rights and fundamental freedoms.²⁷⁵ The dilemma of activism *versus* restraint has emerged also in relation to Article 8. More specifically, it seems that the concept of family life has been caught in between two *prima facie* opposing, and yet complementary, needs: to guarantee a greater match with changing social realities and to respect State-specific variations.

The institution of the family has been traditionally conceived as a matter "private" to States and, as such, to be regulated within their domestic jurisdiction.²⁷⁶ Having regard to the European Union, for instance, parenthood does not fall within its original legislative competences. This is mainly due to the fact that Community Law emerged in order to address an economic imperative; "It was market creating rather than market correcting".²⁷⁷ The organisation of parenting and, therefore, issues relating to gender equality were considered to the extent that they had economic consequences.²⁷⁸ Therefore, although the importance of attaining equality between men and

²⁷² Nikolaidis, 'The Right to Equality', 53.

²⁷³ *Ibid.*

²⁷⁴ Mahoney, 'Judicial Activism', 59.

²⁷⁵ *Ibid.*

²⁷⁶ The public/private divide applies also to domestic law. Direct State intervention in the family and the home has for a long time been considered improper, with significant repercussions on the lives of women. This theme has been widely discussed within feminist scholarship. For instance, see K. O'Donovan, *Sexual Divisions in Law (Law in Context)* (Weidenfeld and Nicolson, 1985).

²⁷⁷ E. Caracciolo di Torella, 'Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union' 20(1) January 2014 *European Law Journal* 89.

²⁷⁸ *Ibid.*

women was often recognised, it did not represent the principal goal pursued by the EU.²⁷⁹ However, this clarifies the reasons why the EU began to engage with parenthood and its regulation in the fields of freedom of movement and employment.²⁸⁰

In the broader context of international law, all major human rights instruments include provisions applicable to the family. For instance, both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights provide that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.²⁸¹ Nonetheless, the right to respect for private and family life has historically been understood as entailing only the State’s negative duty to abstain from interfering with the private and family sphere.²⁸² In addition to overlooking the family as a *locus* of potential abuse and, therefore, leaving the structural subordination of women untouched,²⁸³ this very traditional view of the role of the State has been largely criticised for reproducing the public/private dichotomy within international human rights law.²⁸⁴ Yet, it should be acknowledged that increasing recognition of the existence of human rights positive obligations has generally led to States’ greater involvement in the sphere of the family.

This division of labour between national jurisdictions and supranational or international jurisdictions can be further explained by the social and cultural variations in the understandings and practices of fatherhood across different States. Although the multiple (and often contested) ideas around fatherhood, which cut across institutional and cultural settings, have made the relationship between law and fatherhood a subject of international interest,²⁸⁵ the pronounced moral dimension of the concepts of ‘family’, *in primis*, and subsequently ‘fatherhood’, have eventually made these debates context-specific. As underlined by sociological, anthropological as

²⁷⁹ *Ibid.*

²⁸⁰ McGlynn, ‘Families and the EU’, 79-80.

²⁸¹ Article 16(3), Universal Declaration of Human Rights (10 December 1948); Article 23, International Covenant on Civil and Political Rights (16 December 1966, entry into force 23 March 1976).

²⁸² R. Eisler, ‘Human Rights: Toward an Integrated Theory for Action’ 1987 9 *Human Rights Quarterly* 287-308; S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, 2008), 1.

²⁸³ For instance, H. Charlesworth, C. Chinkin and S. Wright, ‘Feminist Approaches to International Law’ 1991 85 *American Journal of International Law* 627,636; E. Brems, ‘Protecting the Rights of Women’ in G. Lyons and J. Mayall (eds.), *International Human Rights in the 21st Century – Protecting the Rights of Groups* (Rowman and Littlefield, 2003), 112.

²⁸⁴ C. Chinkin, ‘A Critique of the Public/Private Dimension’ 1999 10(2) *European Journal of International Law* 390, 393.

²⁸⁵ R. Collier, ‘The Responsible Father in New Labour’s Legal and Social Policy’ in J. Bridgeman, H. Keating and L., Craig (eds.) *Regulating Family Responsibilities* (Ashgate, 2011), 47.

well as historical literature, any reconsideration and redefinition of fatherhood has been moulded by the specificities of the national legal systems, local cultures within legal practice and, more generally, gender and power relations within the specific context of reference.

At the same time, family realities are one of the fastest changing domains in society. Since the drafting of the ECHR, we have witnessed unpredictable transformations in the forms of personal and social relationships between individuals living within the Council of Europe and/or in other States. These evolutions have triggered the need for updating the Court's jurisprudence and the expansion of the notion of 'family life' under Article 8 (illustrated in detail in the next section) constitutes a lively depiction of this process.²⁸⁶ A clear example of this trend is represented by the judgment in *Schalk and Kopf v Austria*,²⁸⁷ concerning the inability for a same-sex couple to marry under Austrian law. In this case, the Court overturned its previous jurisprudence and concluded that the relationship of the applicants, a cohabiting same-sex couple in a stable partnership, fell within the notion of 'family life' under Article 8, just as any relationship of the same kind between heterosexual partners. It is interesting to note that the inclusion of homosexual partnerships within the definition of family life was premised exactly on the "rapid evolution of social attitudes towards same-sex couples [that] has taken place in many Member States".²⁸⁸

If we stop here, the judgment in *Schalk and Kopf v Austria* reveals the Court's willingness to reflect contemporary social behaviours and, thus, to expand the boundaries of family life to include same-sex couples.²⁸⁹ However, if we consider the final outcome of the case, this judgment expresses also the Court's unwillingness to deviate from the text of the Convention, when there has not been a significant evolution in the laws of the Contracting States. Indeed, despite the shift in the Court's interpretation of family life, the Court found itself bound by the language and the origins of the Convention with respect to the right to marry. More specifically, it refused to interpret Article 12 ECHR as to grant same-sex couples access to marriage because "although the institution of marriage has undergone major social changes since the adoption of the Convention, (...) there is no European consensus regarding same-sex marriage".²⁹⁰ Given the absence of a

²⁸⁶ A. Mowbray, 'Between the will of the Contracting States and the needs of today – Extending the scope of Convention right sans freedoms beyond what could have been foreseen by the drafters of the ECHR' in in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2014), 26.

²⁸⁷ *Schalk and Kopf v Austria*, Application no. 30141/04, 24 June 2010.

²⁸⁸ *Ibid.*, para 93.

²⁸⁹ Mowbray, 'Between the will and the needs', 28.

²⁹⁰ *Schalk and Kopf*, para 58.

present-day consensus on the right of same-sex couples to marry (at the material time, same-sex marriage was allowed in only six Contracting States), the Court concluded that the applicants had not suffered a violation of Article 12. Therefore, as argued by Mowbray, the decision in *Schalk and Kopf* can be finally seen as an “illustration of the Court respecting the will of the states rather than the applicant’s contention (supported by non-governmental organisation) that the needs of today require states to permit civil marriage for same-sex couples”.²⁹¹

Despite the specific outcome, this judgment is also emblematic of the development of the notion of ‘family life’ and, more generally, of the scope of Article 8 as a result of natural tensions between two attitudes of adjudication, which tend to resonate with the two main interpretative tools employed by the Court. On the one hand, judicial activism – exercised through the living instrument doctrine – pushes the boundaries of the Convention towards progress.²⁹² On the other hand, judicial self-restraint – expressed through the doctrine of the margin of appreciation, coupled with the Court’s reliance on comparative empirical evidence and the policy of incremental advancement – helps to make sure that judges do not go too far, too fast.²⁹³

In light of this, it seems possible to imagine that also the Court’s adherence or departure from conventional fatherhood has been contingent upon the interplay between these two interpretative forces: the doctrine of the margin of appreciation and a dynamic interpretation of the Convention. Therefore, as a sub-question, it will be interesting to explore whether and, if so, to what extent the Court has made use of these two tools, respectively, and with what effects. Before embarking on a detailed analysis of the expansion of the right to respect for family life within the Court’s jurisprudence, the following two sections will focus on the operational characteristics, the advantages and the dangers inherent in these two doctrines.

7.1. The Interpretation of the Convention as a Living Instrument: between Consensus and Effectiveness

Going beyond the case of *Schalk and Kopf*, it is argued that overall the Court has tended to interpret and apply the Convention in light of present-day conditions and needs.²⁹⁴ It is no coincidence that one of the main doctrinal lines of argument employed by the Court to shape its jurisprudence

²⁹¹ Mowbray, ‘Between the will and the needs’, 29.

²⁹² Mahoney, ‘Judicial Activism’, 88.

²⁹³ *Ibid.*

²⁹⁴ Mowbray, ‘Between the will and the needs’, 36.

resonates with a dynamic or evolutive interpretation. Despite triggering fears of judicial creativity²⁹⁵ – together with concerns about democratic illegitimacy – the *rationale* underlying this tool of interpretation reflects the true intention of the founding fathers to create an instrument for the protection of rights, which are practical and effective and not theoretical and illusory.²⁹⁶

The ‘living instrument’ approach was inaugurated by the judgment in *Tyrer v the United Kingdom*.²⁹⁷ In assessing whether the existence of corporal punishment was in conformity with the prohibition of degrading treatment or punishment, the Court held for the first time that “the Convention is a living instrument which (...) must be interpreted in the light of present-day conditions”.²⁹⁸ The implications of this statement were made particularly clear in the judgment of *Marckx v Belgium*, which was decided one year later. In this case, the Court decided that the unfavourable treatment of an unmarried mother and her child born out of wedlock under Belgian law violated their right to respect for family life and breached the requirement under Article 14 that Convention rights should be secured without discrimination. In reaching this conclusion, the Court recognised that “at the time when the Convention (...) was drafted, it was regarded as permissible and normal in many European countries to draw a distinction (...) between the ‘legitimate’ and the ‘illegitimate’ family”.²⁹⁹ However, given that the Convention had to be interpreted in light of present-day conditions, the standards that were granted conclusive relevance were those accepted in European society at the material time.³⁰⁰ In particular, it was observed that the domestic law of the great majority of the Member States of the Council of Europe has evolved and was continuing to evolve, together with the relevant international instruments, towards full recognition of the rule *mater semper certa est*.³⁰¹

Thus, as explained by Mahoney, the focus must be on the drafters’ general intention, as opposed to their particular intention at the time of adoption of the Convention.³⁰² The living

²⁹⁵ G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007), 72.

²⁹⁶ *Inter alia*, see *The Belgian Linguistic case*, Applications no. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, 23 July 1968, paras 3-4; *Golder v UK*, Application no. 4451/70, 21 February 1975, para 35; *Marckx v Belgium*, Application no. 6833/74, 13 June 1979, para 31.

²⁹⁷ *Tyrer v the United Kingdom*, Application no. 5856/72, 25 April 1978.

²⁹⁸ *Ibid*, para 31.

²⁹⁹ *Marckx v Belgium*, para 41.

³⁰⁰ Harris, Bates et al., ‘Law of the ECHR’, 9.

³⁰¹ *Marckx v Belgium*, para 41.

³⁰² Mahoney, ‘Judicial Activism’, 70; Rainey et al., ‘The European Convention on Human Rights’, 67. As a result, the *travaux préparatoires* can be relied on merely as a supplementary means of interpretation (Article 32 of the Vienna Convention on the Law of Treaties) and, if at all, as a guide to the general intentions of the Contracting Parties, rather than to restrict the scope of specific provisions.

instrument doctrine is, therefore, an interpretative technique aimed at enabling the Court to update its jurisprudence in accordance with new/changed conditions not foreseeable by the original drafters.³⁰³ When used to creatively interpret the Convention, however, the living instrument doctrine cannot go as far as to reading new rights into the Convention, especially when they were left deliberately out of the Convention.³⁰⁴ This explains why, for instance, an evolutive interpretation of Article 12 (the right to marry) that includes the right to divorce has not been possible, despite divorce being generally accepted and recognised as a right in the jurisdictions of the Member States.³⁰⁵ The only material that can be interpreted in an evolutive fashion and, possibly, brought into fields or in directions unforeseen by the drafters, is a right that is already explicitly or implicitly stated in the text of the Convention.³⁰⁶ However, rather than discovering rights that are not explicitly mentioned, what is more concerning and dangerous is that the Court does not always manage to legitimise a dynamic interpretation with the support of objective, predictable and transparent rules that guide its discretion.³⁰⁷ Hence, it is sometimes disputed whether the Court actually reflects present-day conditions or, conversely, attempts to interpret the Convention in order to shape and impose new conditions.³⁰⁸

Before setting a new standard through an evolutive interpretation of the Convention, the Court has proved quite thoughtful by anchoring its interpretation to State practice primarily.³⁰⁹ When States have expressed their intention to review the extension of a Convention right through the negotiation and ratification of additional protocols (for instance, with respect to the death penalty) or where a Convention provision was formulated as having a clearly restricted ambit and the relevant practice of the Contracting States has not subsequently expanded that right (like, in the case of *Shalk and Kopf*), the Court has felt mostly unprepared to interpret the Convention against the will of the states.³¹⁰

Therefore, the methodology employed by the Court seems to require any step forward in

³⁰³ P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2013), 85.

³⁰⁴ Harris, Bates et al. 'Law of the ECHR', 9. This stems also from the importance attached to 'ordinary meaning', as stated in the Vienna Convention on the Law of Treaties.

³⁰⁵ *Ibid.* See *Johnston v Ireland*, Application no. 9697/82, 18 December 1986.

³⁰⁶ Mahoney, 'Judicial Activism', 66.

³⁰⁷ T. Zwart, 'More human rights than Court: Why the legitimacy of the European Court of Human Rights is in need of repair and how it can be done' in S. Flogaitis, T. Zwart and J. Fraser (eds.), *The European Court of Human Rights and its Discontents – Turning Criticism into Strength* (Edward Elgar, 2013), 89.

³⁰⁸ Johnson, 'Homosexuality and the ECtHR', 85.

³⁰⁹ *Ibid.*

³¹⁰ Mowbray, 'Between the will and the needs', 36-37.

the interpretation to be supported by empirical evidence and is not based on the judges' perception of the common will.³¹¹ At least in principle, empirical evidence of a material change in law and society acts as a constraint on the Court's power of review.³¹² As a result, despite its flexibility, the evolutive interpretation is "a limited means of adaptation"³¹³ of the Convention. In fact, if there is no consensus on the side of Contracting States, the Court has tended to rely upon national legislation by adopting a lowest common denominator approach or to respect variations in State practice by resorting to the doctrine of the margin of appreciation of the State.³¹⁴

In a number of cases and contexts, including family life, the Court has produced empirical evidence of the common will by means of a comparative approach – for instance, through comparative surveys of the laws of the Contracting States.³¹⁵ The weight placed on state practice reveals that, different from other international instruments, the interpretation of the Convention might be grounded legitimately on a shared European standard or a legal tradition common to the countries of the Council of Europe.³¹⁶ However, the Court has never clarified what makes a standard common or shared and, in practice, the establishment of commonly accepted standards has followed more or less loose and linear measurements, thus sometimes raising doubt as to whether the Court is paying lip service to the idea of common ground.³¹⁷

Despite the erratic use of the rule of consensus, it has been argued that interpreting the Convention as a living instrument is a legitimate and even necessary exercise to preserve the credibility and the effectiveness of the ECHR system.³¹⁸ Rather than being disregarded, the text and the drafters' intention are attached substantive meaning to make the Convention provisions

³¹¹ Mahoney, 'Judicial Activism', 74.

³¹² *Ibid.*, 86.

³¹³ S. Prebensen, 'Evolutive Interpretation of the Convention on Human Rights' in P. Mahoney, F. Matscher, H. Petzold and L. Wildhaber (eds), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssdal* (Carl Heymanns Koln, 2000), 1136.

³¹⁴ *Ibid.*; Harris, Bates et al., 'Law of the ECtHR', 11.

³¹⁵ Harris, Bates et al., 'Law of the ECtHR', 11.

³¹⁶ Rainey et al., 'The European Convention on Human Rights', 78.

³¹⁷ Moreover, the use of the rule of consensus as a method for determining human rights has been heavily criticised. See for instance, Letsas, 'A Theory of Interpretation', XI: "judges who adjudicate on rights have a duty to discover and give effect to the morally best understanding of human rights, irrespective of Contracting States' current consensus"; L. Hodson, 'A Marriage by Any Other Name? *Schalk and Kopf v Austria*', 177. Other commentators, instead, have considered the rule of consensus as a construct through which the Court legitimises its interpretation and, more generally, its role. See for instance, Johnson, 'Homosexuality and the ECtHR', 77; R. Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Clarendon Press, 1995), 139.

³¹⁸ Mahoney, 'Judicial Activism', 86.

practical and effective (as opposed to theoretical and illusory) in present times.³¹⁹ Nonetheless, the Court's power to read the Convention in accordance with present-day conditions is not unlimited. Indeed, the effective functioning of the ECHR system is very much contingent upon the confidence and trust that Contracting States have in the Strasbourg machinery and, more specifically, in the Court.³²⁰

Given that the ultimate responsibility for implementing the Convention rests with States, no advantage stems from the imposition of progressive judgments, through the interpretation of the Convention as a living instrument, on unreceptive national authorities. Rather, effectiveness is conditioned upon the Court acting with caution, assuring a certain pattern of continuity and stability and achieving jurisprudential progress only through minimal, incremental additions within specific fields, rather than surprising parties with abrupt changes.³²¹ Therefore, as emphasised by the Court itself, it can advance (dynamic) interpretations only to the extent strictly necessary for the resolution of the case under scrutiny.³²² This constraint clarifies why the Court frequently specifies that its reasoning is limited to the specific circumstances of the case at hand as well as the Court's reluctance to express itself on controversial legal issues unless strictly required by the facts of the case, even if these questions might be relevant for the development of the Court's jurisprudence.³²³

7.2. The Doctrine of the Margin of Appreciation: Two Types and Related Dangers

In light of the above, the Court has attempted to prevent judges from exceeding their interpretative tasks by developing a tool of self-restraint, namely the doctrine of the margin of appreciation.³²⁴ As explained by Benvenisti, this doctrine is grounded in the notion that "each society is entitled to certain latitude in resolving the inherent conflicts between individual rights and national interests or among different moral convictions".³²⁵ Its *rationale* is closely interwoven with the principle of

³¹⁹ *Ibid.*

³²⁰ *Ibid.*, 77.

³²¹ *Ibid.*; J. Fraser, 'Conclusion: The European Convention on Human Rights as a common European endeavour' in S. Flogaitis, T. Zwart and J. Fraser (eds.), *The European Court of Human Rights and its Discontents – Turning Criticism into Strength* (Edward Elgar, 2013), 198.

³²² Mahoney, 'Judicial Activism', 87.

³²³ *Ibid.*, 77.

³²⁴ It was firstly articulated in the case of *Handyside v UK* (Application no. 5493/72, 7 December 1976), where an interference with freedom of expression as a result of the applicant's conviction for obscene publication was found to fall within the State's margin of appreciation.

³²⁵ E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' 1998-1999 31 *NYU Journal of International Law and Politics* 843.

subsidiarity³²⁶ and the Court's international nature. According to the division of enforcement responsibility whereby the Convention system is grounded, national authorities hold the primary duty to protect the guaranteed rights and freedoms within their domestic legal systems and, depending on the nature of the issue and on the state of consensus, this responsibility might imply a certain degree of discretion as to the appropriate means of implementation.³²⁷

While a disparity between the practices of Contracting States will often, but not always, trigger room for legitimate difference of opinion, the existence of a European consensus will generally imply a limited area of discretion for States that do comply.³²⁸ It follows that a violation cannot be found, unless national authorities have exceeded or misused their discretion, even if judges feel that there is a better way of implementing the Convention or realising the goals of the Convention.³²⁹ Therefore, the doctrine of the margin of appreciation helps to draw the boundaries between and, at the same time, to reconcile the sovereignty and autonomy of the national authorities and the interpretative role of the Court.³³⁰ As such, the doctrine fits into the interpretation of the Convention as a living instrument; more specifically, it embodies the elements of representative government and majority rule that counterweight the need for expanding the Convention's core protections in line with contemporary conditions.³³¹

The doctrine has thus far attracted more condemnation than approval. The most basic strand of criticism argues that the doctrine lacks textual legitimacy since it is not enshrined in the text of the Convention but it is an invention of the Strasbourg organs.³³² More importantly, most commentators condemn the doctrine of the margin of appreciation for its inconsistent *modus*

³²⁶ *Handyside v UK*, para 48.

³²⁷ Y. Arai-Takahashi, 'The margin of appreciation doctrine: a theoretical analysis of Strasbourg's variable geometry' in G. Ulfstein, A. Follesdal and B. Peters (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP, 2013), 62-63; Mahoney, 'Judicial Activism', 86-87.

³²⁸ Mahoney, 'Judicial Activism', 87. A very concise and clear definition of the margin of appreciation is provided by Nikolaidis, 'The Right to Equality', 56: "in essence, the margin of appreciation aims to ensure that where no consensus exists among Member States on a controversial issue, the view of the defending State will prevail as long as the measure in question pursues a legitimate aim and the principle of proportionality is adhered to".

³²⁹ Mahoney, 'Judicial Activism', 87.

³³⁰ Mahoney, 'Judicial Activism', 84; W. Waldock, 'The Effectiveness of the System Set up by the European Convention on Human Rights' 1980 1 *Human Rights Law Journal* 9; Gerards, 'Judicial Review', 168.

³³¹ Mahoney, 'Judicial Activism', 84.

³³² Letsas, 'A Theory of Interpretation', 80; D. Spielmann, 'Allowing the Right Margin – the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' February 2012 *CELS Working Paper Series*, 2 – online at http://www.cels.law.cam.ac.uk/cels_lunchtime_seminars/Spielmann%20-%20margin%20of%20appreciation%20cover.pdf (last access on 26 January 2015)

operandi.³³³ In particular, it has been pointed out that the Court's reasoning has sometimes failed to use the doctrine in a way that supports legal certainty and obeys clear principles, thus diluting the normative guidance of substantive rights provisions.³³⁴ Apart from triggering normative ambiguity, a standardless application of the doctrine entails the risk of producing a "pernicious 'variable geometry' of human rights",³³⁵ undermining the *acquis* of existing jurisprudence and producing different levels of protection in the Contracting States.³³⁶ The doctrine has even been compared to "spreading disease",³³⁷ since its scope of application has been expanded to undermine one of the crucial roles of the Strasbourg machinery, namely "to ensure the observance of the engagements undertaken by the High Contracting Parties".³³⁸

Efforts devoted to systematise the use of the doctrine of the margin of appreciation have resulted in the identification of two sub-types, which also replicate two dimensions of the principle of subsidiarity.³³⁹ The first variant, which is called structural, resonates with what Ambrus refers to as the 'original' concept of the margin of appreciation.³⁴⁰ As such, it reflects the structural dimension of the principle of subsidiarity, which provides for a vertical division of labour between a supranational court and national legal systems.³⁴¹ The structural concept of the doctrine can, therefore, be easily spotted in those cases where the Court finds no consensus among Contracting States on what human rights individuals have and, consequently, declares national authorities 'better placed' to assess local values.³⁴² As a result, in these cases, the Court will generally neither find a violation nor scrutinise national decisions for reasons pertaining to the nature of the ECtHR. Rather, the doctrine of the margin of appreciation will be invoked to address the limits or intensity

³³³ For instance, R. Macdonald, 'The Margin of Appreciation' in R. Macdonald, F. Matscher and H. Petzold (eds.), *The European System for the Protection of Human Rights* (1993), 85.

³³⁴ Y. Shany, 'Towards a General Margin of Appreciation Doctrine in International Law ?' 2005 16(5) *European Journal of International Law* 937.

³³⁵ Lord Lester of Herne Hill, QC, 'The European Convention of Human Rights in the New Architecture of Europe' *Proceedings of the 8th International Colloquy on the European Convention on Human Rights* (Council of Europe, 1995), 236.

³³⁶ Andenas and Bjorge, 'National implementation of ECHR rights', 188; Benvenisti, 'Margin of Appreciation', 844.

³³⁷ P. Van-Dijk and G. Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer Law and Taxation, 1990), 605.

³³⁸ Article 19 ECHR.

³³⁹ Letsas, 'A Theory of Interpretation', 81-98; Arai-Takahashi, 'The margin of appreciation doctrine', 92-94.

³⁴⁰ M. Ambrus, 'The European Court of Human Rights and the Standards of Proof – An Evidentiary Approach towards the Margin of Appreciation' in L. Gruszczyński and W. Werner (eds.), *Deference in International Courts and Tribunals – Standard of Review and Margin of Appreciation* (OUP, 2014), 235.

³⁴¹ *Ibid*, 236.

³⁴² Letsas, 'A Theory of Interpretation', 91.

of its own review due to its status as international court.³⁴³

As pointed out by Macdonald, the danger is that the margin of appreciation is used as a device for the Court to evade its duty to articulate the reasons for deference.³⁴⁴ It is clear that, if the Court provides as the only reason for not intervening is because the matter falls within the margin of appreciation of the State, it is simply expressing its conclusion to not review the case, thus leaving the real reasoning obscure.³⁴⁵ Such use of the doctrine would therefore obfuscate the fundamental distinction between reviewability and justifiability.³⁴⁶ The Court would, indeed, fail to grasp the subtlety of a “context-dependent spectrum of appropriate intensity, ranging from total deference (amounting to unreviewability at one extreme) through less deferential standards to the most stringent standard of justification at the other”.³⁴⁷

Differently, the second type of the doctrine of the margin – called substantive – is employed to settle a tension between individual freedoms and collective goals.³⁴⁸ It is no coincidence that this concept of the doctrine is very well displayed by the accommodation clauses in Articles 8, 9, 10 and 11 and, more specifically, emerges when balancing the rights set down in paragraph 1 against possible interferences that might be justified under paragraph 2.³⁴⁹ To sum up, these are cases where there was interference but, eventually, no violation was found because the Court believed that the human rights of the applicant had not been violated. To reach this determination, the Court usually employs a four-stage test: firstly, it investigates whether there is an interference; if so, whether the interference was prescribed by law;³⁵⁰ whether the purpose falls within the list of legitimate aims mentioned in the accommodation clause; and, finally, whether the interference was proportionate or necessary in a democratic society.³⁵¹

Hence, there exist a strong correlation between the substantive variant of the doctrine of

³⁴³ *Ibid.*, 81.

³⁴⁴ Macdonald, ‘The Margin of Appreciation’, 84.

³⁴⁵ *Ibid.*, 85.

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.*, 84.

³⁴⁸ Letsas, ‘A Theory of Interpretation’, 84; Arai-Takahashi, ‘The margin of appreciation doctrine’, 94.

³⁴⁹ *Ibid.*

³⁵⁰ As observed by Arold et al., the conformity with national law has not proved sufficient in the Strasbourg case-law; rather, the quality of the law has also been deemed important and, therefore, “in accordance with the law” shall be read as compatible with the rule of law. See N. Arold Lorenz, X. Groussot and G. Petursson, *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?* (Martinus Nijhoff, 2013), 78.

³⁵¹ The Court has not specified the characteristics of a democratic society. Rainey et al. have suggested the values of pluralism, tolerance, equality, and liberty are integral components of any democracy. See Rainey et al., ‘The European Convention on Human Rights’, 307.

the margin of appreciation and the principle of proportionality.³⁵² Existing literature points to three main forms of proportionality test employed by the Court.³⁵³ The strictest type addresses the question: is the contested measure the least restrictive/onerous that could be taken, given the circumstances of the case?³⁵⁴ The second form resonates with what Arai-Takahashi calls ‘sufficiency test’.³⁵⁵ Here, the Court assesses whether relevant and sufficient reasons to justify the interference under scrutiny can be found. Finally, the most lenient type is commonly referred to as ‘fair balance test’.³⁵⁶ When applied, the Court asks whether there is a reasonable relationship of proportionality between the interference and the legitimate aim pursued or whether a fair balance between the private and the public interests at stake has been struck.³⁵⁷ While there is no consensus on what doctrine influences the other, scholars agree upon the fact that there is a generally inverse relationship between these two doctrines. Therefore, the wider is the margin accorded to States, the stricter is the proportionality test applied by the Court.³⁵⁸

The use of the doctrine of the margin of appreciation in its substantive variant expresses the Court’s willingness to develop a sense of partnership with national authorities, which consists in a “shared decision-making process and the joint responsibility for the final outcome”.³⁵⁹ As such, a substantive version of the doctrine highlights the importance of deference to national authorities resorting to arguments of legitimacy.³⁶⁰ At the same time, however, the danger of placing the threshold of local deference too low has given rise to concerns and further criticism on the *modus operandi* of the doctrine. Firstly, the Court has been criticised for escaping the responsibility for its decisions. In other words, an excessive resort to the judicial self-restraint rationale might produce a pattern of non-accountability.³⁶¹ Secondly, the Court has been deemed to abdicate its institutional and, to a certain extent, constitutional task of setting universal human

³⁵² M. Ambrus, ‘The European Court of Human Rights and the Standards of Proof’, 235.

³⁵³ S. Choudhry and J. Herring, *European Human Rights and Family Law* (Hart, 2010), 29.

³⁵⁴ Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002), 88.

³⁵⁵ *Ibid*, 87.

³⁵⁶ Choudhry and Herring, ‘European Human Rights and Family Law’, 32-33.

³⁵⁷ *Ibid*, 32.

³⁵⁸ The particular implications of this relationship on Article 8 will be mentioned in section 8.1 and, to the extent possible, throughout the case-law analysis.

³⁵⁹ Shany, ‘Towards a General Margin of Appreciation’, 922. See also P. Mahoney, ‘Marvellous Richness of Diversity or Invidious Cultural Relativism’ 1998 19 *Human Rights Law Journal* 3.

³⁶⁰ Arai-Takahashi, ‘The margin of appreciation doctrine’, 94.

³⁶¹ *Ibid*, 80.

rights standards, against the “tyranny of the majority”,³⁶² or its duty to independently review of governmental conduct.³⁶³ Similar criticism has gone as far as to state that the Court seems to “retreat evasively into the thinly disguised veneer of cultural relativism”.³⁶⁴

To conclude, judicial self-restraint and judicial activism are indispensable ingredients for a balanced and effective jurisprudence that promotes human rights in contemporary societies, while respecting a legitimate range of opinions. While the existence of consensus might prepare the ground for a dynamic interpretation of the Convention, a lack of consensus among Member States will usually be accompanied by a certain margin of appreciation enjoyed by the State.³⁶⁵ Hence, although *prima facie* conflicting, the evolutive interpretation and the doctrine of the margin of appreciation represent two sides of the same coin.³⁶⁶

8. Introducing the Core Provisions of the European Convention of Human Rights

8.1. The Interpretation of the Right to Respect for Family Life within the ECtHR Jurisprudence: Multiple Dimensions of Expansion

Article 8 is by far the most litigated provision from a family law perspective. The first paragraph provides that “everyone has the right to respect for his private and family life, his home and his correspondence”. Concerning its personal scope, by stating “everyone”, Article 8 incorporates the rights of both parents and children to respect for private and family life. Therefore, it is no coincidence that family disputes involving children often consists in tensions between the conflicting Article 8’s rights of all parties concerned. Hence, whether the Court takes into consideration all parties affected when developing its jurisprudence under Article 8 proves to be a relevant sub-question to be addressed in the upcoming case-law analysis.

Regarding its material scope, for those who are familiar with the Strasbourg jurisprudence under Article 8, it is absolutely clear how far beyond the basic text of the provision the Commission

³⁶² S. Wheatley, ‘Deliberative Democracy and Minorities’ 2003 14 *European Journal of International Law* 526.

³⁶³ Benvenisti, ‘The Margin of Appreciation’, 844; Mahoney, ‘Marvellous Richness’, 4-5.

³⁶⁴ Arai-Takahashi, ‘The margin of appreciation doctrine’, 101. This argument was made in relation to the judgment in the case of *Schalk and Kopf v Austria*, concerning the right to marry of same-sex couples. See para 62 of the judgment. On this point, see also P. Mahoney, ‘Marvellous Richness’, 1.

³⁶⁵ Johnson, ‘Homosexuality and the ECtHR’, 77.

³⁶⁶ Mahoney, ‘Judicial Activism’, 57-80.

and, subsequently, the Court have gone. Since the 1950, the four notions – private life, family life, home, and correspondence – have become the “nursery in which (a multiplicity of sub-rights and interests which were not conceivable at the time of drafting) are born”.³⁶⁷ The ECHR was tactically conceived as and structurally remains an example of a one-dimensional approach to rights and duties.³⁶⁸ With few exceptions, most of the safeguards enshrined in the text of the Convention regard civil and political rights and, therefore, rights to freedom from interference.³⁶⁹ This primarily one-dimensional structure can be linked and explained through reference to a particular general purpose of the Convention, as identified by Bates. On the basis of a study on the historical development of the Convention, Bates has pointed to the creation of a “collective pact against totalitarianism” as the principal aim pursued by the drafters in 1950.³⁷⁰ Given that it was conceived in the aftermath of the Second World War, its mission was allegedly to protect human rights and the rule of law and to promote democracy across Europe.

However, if considered in ‘action’, it appears that this function of the Convention has emerged only in a tiny minority of inter-State cases, thus remaining amply dormant.³⁷¹ At the same time, the Strasbourg organs seem to have embarked on another mission, which resembles the creation of a type of European Bill of Rights.³⁷² This explains why the individual’s right of recourse has been given greater importance *vis-à-vis* that of States and the Court’s relationship with Contracting Parties is centred upon roles which are to a large extent constitutional.³⁷³ The tension between these two potential aims of the Convention and their respective repercussions on

³⁶⁷ M. Burbergs, ‘How the right to respect for private and family life, home and correspondence became the nursery in which new rights are born’ in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2014), 315.

³⁶⁸ Harris, Bates et al., ‘Law of the ECHR’, 5. The almost exclusive focus on civil and political rights responded to an immediate need for a brief and non-controversial document that States would have easily accepted.

³⁶⁹ *Ibid.* Among the exceptions, the rights to property and education (Articles 1 and 2, Protocol 1) and the principle of equality between the spouses (Article 5, Protocol 7). The right to respect for family is considered to include aspects of both civil and political rights as well as economic, social and cultural rights.

³⁷⁰ E. Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (OUP, 2010), preface.

³⁷¹ D. Harris, M. O’Boyle and C. Warbrick, *Law of the European Convention on Human Rights* (Butterworth, 1995), 2.

³⁷² *Ibid.*, preface and 65-74.

³⁷³ A. Follesdal, B. Peters and G. Ulfstein, ‘Conclusions’ in A. Follesdal et al. (eds.), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP, 2013), 390. These authors list the following features as common of the ECtHR and national constitutional courts: they both deal with cases of high political or societal importance which often give rise to debates as to what are the fundamental rights and values of society; there is usually a system of case selection; they normally undertake a kind of extraordinary judicial review; their competence includes individual applications and often the judicial review and potentially the annulment of a piece of legislation.

the scope of the Convention rights are very well summarised by the conversations between the majority and the dissenting judge Sir Gerald Fitzmaurice in the case of *Marckx v Belgium*. Against the majority, which concluded that a violation of Article 8 had occurred, Fitzmaurice argued for a particularly narrow and ‘negative’ conception of Article 8. He stated that:

It is abundantly clear (...) that the main, if not indeed the sole object and intended sphere of application of Article 8 (...) was that of what I call the ‘domiciliary protection’ of the individual. He and his family were no longer to be subjected to (...) domestic intrusions, searches and questionings; to restrictions on the use of radio and television; (...) to measures of coercion such as cutting of the electricity or water supply; to such abominations as children being required to report upon the activities of their parents (...) – in short the whole gamut of fascist and communist inquisitorial practices. (...) It was for the avoidance of these horrors, tyrannies and vexations that private and family life (...) were to be respected.³⁷⁴

Clearly, Fitzmaurice adhered to the view that the Convention pursued an anti-totalitarian aim and, therefore, States were under the obligation to merely abstain from interfering with the human rights of individuals. However, the majority proved successful in pushing the overall aim of the Convention beyond its original historical context and prepared the ground for an incremental expansion of the scope of Article 8. Apart from being the battlefield on which conceptions as to the mission of the ECHR machinery have clashed, the judgment in *Marckx v Belgium* has, to a certain extent, determined the expansion and, therefore, the present status of Article 8, and of the whole Convention more generally.³⁷⁵

It seems important to point out that the Court does not openly discuss concepts, such as fatherhood and motherhood; rather, it tends to convey its definitions by approaching the question from the perspective of whether family life can be established under Article 8.³⁷⁶ With regard to family life, the assessment of cases brought under Article 8 is made of one to three steps.³⁷⁷ The first resonates with the establishment of family life within the meaning of the Convention. The classification of the relationship at stake as ‘family life’ is the prerequisite for the following

³⁷⁴ Dissenting Opinion of Judge Sir Gerald Fitzmaurice, *Marckx v Belgium*.

³⁷⁵ Burbergs, ‘Article 8 as a Nursery for New Rights’, 328.

³⁷⁶ Choudhry and Herring, ‘European Human Rights and Family Law’, 170.

³⁷⁷ I have drawn this three-step analytical process from the work of Liddy. See, J. Liddy, ‘The concept of family life under the ECHR’ 1998 1 *European Human Rights Law Review* 16.

stage(s) of analysis. Only if the Court holds that there exists family life, will it continue its investigation to determine whether Article 8 has been violated, by reference to either the concept of failure to respect or the existence of an interference with the right considered. Should interference be found, the Court will embark on a third and final stage, which consists in examining the justification of the interference against the criteria set in Article 8(2): “in accordance with the law”, “legitimate aim” and “necessary in a democratic society”.

For the purposes of the current research, all three stages of analysis undertaken by the Court (when available) are of interest, since they all contribute to bringing to the fore the definition of fatherhood endorsed by the Court. For the sake of simplicity, however, the second and third steps will be considered as part of the same stage of the analysis, as they both address the wider question whether the failed conferral of the status of legal father, or specific rights, amounts to a violation of Article 8. Having regard to the first step, this thesis will therefore explore the threshold at which family life is held, or cannot be held, to exist between a father and his child; in other words, what factors – conventional or not – entail the existence of a family tie worthy of protection under Article 8 between a father and his child or, in the case when the application fails, the missing factors to reach the minimum threshold for an Article 8 violation. In relation to the second and third analytical steps, now unified under one single stage, the case-law analysis will investigate the conditions under which the establishment of family life between a father and his child brings along a set of rights in favour of the paternal figure; or, on the contrary, it will identify the missing conditions that have justified the refusal to grant the applicant rights which fall under fatherhood. As a result of these considerations, for present purposes, family life and fatherhood are not interchangeable terms. Rather, family life is a precondition to fatherhood. The status of legal fatherhood and the conferral of specific parental rights are trotted out by the establishment of family life. However, this does not mean that the Court’s conception of fatherhood can only be analysed when family life is found. On the contrary, if family life does not exist, the very elements that prevented the establishment of family life are also necessary prerequisites for the allocation of the full legal status of fatherhood and parental rights to fathers.

Prior to embarking on a father-specific investigation, this section will outline some of the milestones in the Court’s endeavour to clarify the content of the notion of ‘family life’ and, more generally, of the right to respect for family life. Concerning the former, the Court boasts more than three decades of dedication to defining and redefining the boundaries of the notion of ‘family life’.

Generally, it has maintained a flexible approach to the interpretation of this notion and, to a certain extent, it has attempted to adjust its approach to determining filiation ties and allocating parental rights to new realities of broken, reconstituted and otherwise unconventional families.³⁷⁸ Arguably, this flexibility has been enabled by what Choudhry and Herring calls a “test of intentionality”, namely a concern with the intentions behind the family arrangement.³⁷⁹

In their analysis of the ECtHR jurisprudence, these two authors have pointed out that the form remains the primary criterion to determine the existence of family life. In other words, the best evidence of the parties’ intention to create family life can be found in conventional formalised types of relationships, *in primis* marriage and possibly civil partnership.³⁸⁰ Indeed, the Court’s emphasis on intentionality has benefited public and legal undertakings, other than marriage. In the case of *Burden v the UK*, the Court clarified that the legal consequences of registered partnerships, which couples deliberately decide to incur, make those relationships different from other cohabitations.³⁸¹ Therefore, no analogy can be drawn between married couples and civil partners, on the one hand, and heterosexual and homosexual couples who decide to live together but decide not to become husband and wife or civil partners, on the other hand.³⁸² Hence, it does not seem to be the length and/or the emotional concreteness of these relationships that call for the protection of family life, but rather the existence of a legally binding agreement.³⁸³ Only in the absence of these formal requirements, the Court will embark on a “functional-based”³⁸⁴ analysis of intentionality.

Without a doubt, the overall outcome to date resonates more with a *de facto* – as opposed to a *de jure* understanding of the family. This emphasis on facts is attributable to, *inter alia*, the fact that the notion of ‘family life’ represents an autonomous concept within the Convention. This doctrine, which was developed in 1976,³⁸⁵ implies that the terms used by the Convention do not

³⁷⁸ U. Kilkelly, *The Right to Respect for Private and Family Life; A Guide to Implementation of Article 8 of the European Convention on Human Rights* (Council of Europe, 2003), 16 – online at [http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-01\(2003\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-01(2003).pdf) (last access on 31 January 2015)

³⁷⁹ Choudhry and Herring, ‘European Human Rights and Family Law’, 168.

³⁸⁰ *Ibid.*, 170.

³⁸¹ *Burden v the UK*, Application no. 13378/05, 29 April 2008, para 65.

³⁸² *Ibid.*

³⁸³ Choudhry and Herring, ‘European Human Rights and Family Law’, 170.

³⁸⁴ *Ibid.*, 168.

³⁸⁵ *Engel and others v The Netherlands*, Application no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, 8 June 1976.

necessarily have to be interpreted in accordance with the definitions endorsed by the national legal systems.³⁸⁶ It follows that concepts based on a European tradition and common to the Contracting States are not granted decisive importance for interpretation purposes.³⁸⁷ As a result, families whose structure follows cultural patterns that are not typically European, such as polygamous families, cannot be *a priori* denied protection. This interpretative tool has also provided the Strasbourg organs with a certain degree of flexibility in order to allow them to take into account social, legal and technological developments across the Council of Europe.³⁸⁸

Bearing in mind the risk of oversimplification, three main stages of development can be identified throughout the Court's process of reconfiguring the notion of 'family life': the refusal of marriage as a prerequisite for family life between a child and his/her parents; an increased attention to real and concrete emotional ties between the parties; and the inclusion of 'potential' ties within the scope of family life. Rather than being perceived as separate and perfectly distinguishable, these three sub-phases should be considered closely interrelated and the organic continuation of one another.

The Court began to show awareness of the increasing diversity of existing family arrangements and the growing emergence of non-traditional families as early as in 1979, in its landmark judgment in *Marckx v Belgium*. In determining the applicability of Article 8, the Court accepted a single woman and her child as one form of family no less than others and, consequently, it held that the notion of 'family life' included the 'illegitimate' family in the same way as the 'legitimate' family.³⁸⁹ The Court also specified that 'respect' for family life required "the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family".³⁹⁰

The judgment in *Berrehab v the Netherlands*³⁹¹ consolidated and expanded the Court's findings in *Marckx* to cover divorce as well. In this case, the applicants were a citizen of Morocco, divorced from his Dutch wife, and his daughter, who lived with her mother. After the divorce, the Government of the Netherlands refused to renew the father's work permit and eventually expelled

³⁸⁶ P. Van-Dijk, F. van Hoof, A. van Rijn and L. Zwaak (eds.), *Theory and Practice of the European Convention of Human Rights* (Intersentia, 2006), 690.

³⁸⁷ *Ibid.*

³⁸⁸ Kilkelly, 'A Guide to Implementation of Article 8', 10.

³⁸⁹ *Marckx v Belgium*, para 31.

³⁹⁰ *Ibid.*

³⁹¹ *Berrehab v the Netherlands*, Application no. 10730/84, 21 June 1988.

him from the country. The Court concluded that Article 8 had been violated because the refusal to renew the work permit and the expulsion of the father prevented the applicants from maintaining regular contact. In line with the obligations of ‘respect’ envisaged in *Marckx*, the Court held that a child born within a family union is *ipso jure* part of that relationship; hence, from the moment of the child’s birth and by the very fact of it, there exists a bond between him/her and his/her parents that amounts to family life.³⁹² Although not explicitly stated, it seems that the recognition of family life as a direct consequence of birth opened the door to a wider rule, which permeates most of the jurisprudence concerning family life: the disconnection between the mother-father relationship and the relationship existing between the child and his/her parents.³⁹³ As a rule, these two relationships are deemed to evolve along two parallel tracks and, more importantly, family life between a child and his/her parents is not, at least in principle, contingent upon the nature of the relationship between the two parents.

This has two major implications. Firstly, as already emerging following the *Marckx* decision, the fact that the relationship between the parents is not marriage-based should not compromise or affect the formation of family life between the child and his/her parents. It follows that, although there might be a privileged form of family with respect to family life under Article 8(1), any differential treatment towards children on the ground of family form will not meet the test under Article 8(2).³⁹⁴ Apart from benefiting Ms Marckx, the application of such rule has further meant that family life can also be established between non-married parents and their children. Secondly, as shown by *Berrehab*, the end of the relationship between the parents does not entail the termination of family life between the child and his/her parents. In other words, once it exists, family life between a parent and his/her child cannot be severed, save in exceptional circumstances.³⁹⁵ This confirms that parent-child relationships and mother-father relationships do not, at least in principle, move along together.

Article 8 of the ECHR does not expressly include a right of contact between family members. However, the Strasbourg jurisprudence has repeatedly asserted that, once the existence of family life is established between parent and child, their right to respect for family life under

³⁹² *Ibid.*, para 21.

³⁹³ C. Grabenwarter, *European Convention on Human Rights – Commentary* (C. H. Beck, Hart, Nomos Helbing Lichtenhahn Verlag, 2014), 194.

³⁹⁴ *Ibid.*

³⁹⁵ Liddy, ‘The concept of family life’, 18.

Article 8(1) of the ECHR is intended to embrace their right to contact with each other.³⁹⁶ As clarified in the judgment of *McMichael v the UK*:

[T]he mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, even if the relationship between the parents has broken down, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention.³⁹⁷

According to the principle of 'mutual enjoyment', the child has a right of contact with the father and the mother and each of them enjoys a right of contact with the child. As interpreted by Bainham, these rights generate corresponding duties in two ways.³⁹⁸ Firstly, a right conferred to one person imposes an obligation on the other.³⁹⁹ This implies that, *inter alia*, a residential parent (most likely, a mother) has the duty to allow contact between a child and his non-residential parent (most likely, a father), as long as this right is reasonably exercised.⁴⁰⁰ Secondly, by virtue of his/her rights, the rights-holder is required to undertake certain duties.⁴⁰¹ For instance, the father, who has a right of contact with his child, is under the obligation to enjoy his right by assuming responsible behaviour.⁴⁰² This explains why, in cases of violence, abusive fathers might be legitimately deprived of contact with their children: not because they do not have a right to contact, but because they have failed to preserve it by acting adversely.⁴⁰³

The detachment from marriage and its 'natural' consequences as determining factors for the establishment of family life between a parent and his/her child has been accompanied by a heightened importance attached to the emotional ties between the parties. As noted by Choudhry and Herring, the establishment of family life under Article 8 has become increasingly dependent on the "the real existence of close personal ties" and, although form often remains the first indicator

³⁹⁶ *Keegan v Ireland*, Application no. 16969/90, 26 May 1994; *Kroon and Others v the Netherlands*, Application no. 18535/91, 27 October 1994; *Elsholz v Germany*, Application no. 25735/94, 13 July 2000 (Grand Chamber); *Yousef v The Netherlands*, Application no. 33711/96, 5 November 2002.

³⁹⁷ *McMichael v the UK*, Application no. 16424/90, 24 February 1995, para 86.

³⁹⁸ A. Bainham, 'Contact as a Right and Obligation' in A. Bainham, B. Lindley, M. Richards and L. Trinder (eds.), *Children and Their Families: Contact, Rights and Welfare* (Hart, 2003), 74.

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid.*

⁴⁰¹ *Ibid.*, 75.

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*

of an intention to create family life, the Court will then undertake a functional-based analysis of intentionality.⁴⁰⁴ Using the Court's own explanation, "family life in the sense of Article 8 implies close personal ties in addition to parenthood".⁴⁰⁵ In other words, the existence or non-existence of family life is a question of fact, which depends on the real existence of concrete personal bonds between the individuals concerned.

Already in *Marckx*, the Court observed that "Paula Marckx assumed responsibility for her daughter Alexandra from the moment of her birth and has continuously cared for her, with the result that a real family life existed and still exists between them".⁴⁰⁶ Although it originated within a case brought by a mother, this test has garnered greater relevance to the positions of fathers, since fatherhood has been traditionally less capable of being determined with legal certainty. As early as in the case of *Berrehab*, it was held that divorce "does not alter the fact that, until his expulsion from the Netherlands, Mr Berrehab saw his daughter four times a week for several hours at a time; the frequency and regularity of his meetings with her prove that he valued them very greatly".⁴⁰⁷

As illustrated by this quote, the Court has begun to emphasise that the actual circumstances of the case are decisive in order to determine whether family life between a parent and a child exists. Certain facts have been accorded particular weight in light of their alleged indicativeness of close personal ties, such as the frequency and nature of contact between a parent and his/her child and the acknowledgment of paternity at birth. A further product of a greater emphasis on facts and existing concrete ties is the long-awaited inclusion of same-sex relationships within the concept of family life. In the case of *Schalk and Kopf v Austria*, the Court acknowledged a rapid evolution of social attitudes towards homosexual couples and, consequently, considered it artificial to maintain its previous view, according to which same-sex couples cannot enjoy family life under Article 8.⁴⁰⁸

Finally, the concept of family law under the Court's jurisprudence has witnessed a further expansion to the advantage of 'potential' or 'intended' relationships, which can develop between a natural parent and his/her child born out of wedlock. This particularly malleable definition of family life has been adopted in exceptional cases, where the failed establishment of family life was

⁴⁰⁴ Choudhry and Herring, 'European Human Rights and Family Law', 170.

⁴⁰⁵ *J.R.M. v the Netherlands*, Application no. 16944/90, 8 February 1993 (Commission), Under the Law, para 1.

⁴⁰⁶ *Marckx v Belgium*, para 31.

⁴⁰⁷ *Berrehab v The Netherlands*, para 21.

⁴⁰⁸ *Schalk and Kopf v Austria*, para 94.

not attributable to the applicant.⁴⁰⁹ For the purposes of intended family life, weight has been attached to the nature of the relationship between the natural parents as well as to a demonstrable interest in and commitment by the parent to the child both before and after the birth.⁴¹⁰ This third phase of development clearly represents the ultimate peak of the functional-based test of intentionality, envisioned by Choudhry and Herring.

Whilst attempting to schematize and reach the crux of the Court's jurisprudence on family life, this account has necessarily failed to capture the nuances of family realities – in other words, how scenarios conceptualised here as distinct can actually overlap in practice. Apart from the 'old' families and the 'new' families, a third group of families exists, which, exactly because of their intermediate and transitional/temporary quality, give rise to regulatory complexities of a particularly intricate nature.⁴¹¹ This third group is made of those relationships between biologically unrelated or partially-related children, who are raised under multiple roofs at different times, and their successive parental figures are not necessarily united by marriage. It is hoped that the concrete examples of some of the main challenges triggered by the transformation(s) and the fragmentation of the family have been properly explained in the section on 'The Conventional Paradigm of the Family under Challenge'. What is important to recall is that evolving family practices and realities have thrown into confusion the typical category-based approach of the law and, more specifically, the ideal of the 'conventional family' that has consistently guided the interpretation and application of family law.

In addition to opening the doors of family life to new loving and caring arrangements, the interpretation of the right to respect for family life has resulted in the creation of a set of sub-rights and, consequently, in the imposition of new, positive obligations upon States. As previously mentioned, the vast majority of Convention provisions enshrine civil and political rights. Under the traditional perspective, this group of rights merely entail negative obligations, namely the prohibition of State interference with the right concerned. However, since the famous judgment in *Marckx v Belgium*, the Court has increasingly required Contracting States to actively protect or

⁴⁰⁹ For instance, see *Schneider v Germany*, Application no. 17080/07, 15 September 2011 (examined in detail in chapter 3).

⁴¹⁰ *Ibid*, para 82; *Nylund v Finland*, Application 27110/95, 29 June 1999 (admissibility decision); *Lebbink v the Netherlands*, Application no. 45582/99, 1 June 2004.

⁴¹¹ Liddy, 'The concept of family life', 25.

fulfil Convention rights.⁴¹² Having regard to Article 8, the Court specified that:

The object of (Article 8) is “essentially” that of protecting the individual against arbitrary interference by the public authorities. Nevertheless it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective “respect” for family life.⁴¹³

Since then, the existence of positive obligations has been repeatedly invoked by the Court to extend the scope of application of existing rights, as far as to enter the socio-economic sphere.

Despite its widespread resort to positive obligations, the Court never felt the need to articulate a general theory.⁴¹⁴ Rather, it has preferred to adopt a case-by-case approach, thus leaving the *ratio* and the principles that guide a correct application of positive obligations obscure.⁴¹⁵ What is clear, however, is that resorting to the concept of positive obligations has supported the Court in accomplishing its mission to interpret the Convention as a ‘living instrument’.⁴¹⁶ The interpretation of ‘respect’ in active terms – rather than as a passive concept – has enabled the Court to expand the scope of the right to respect for family life, in light of evolving social and moral assumptions.

Within the context of family life, the positive obligations approach has proved particularly fundamental to serve two purposes: to promote the legal recognition of family ties and to protect the integrity of family ties.⁴¹⁷ Once again, the Court’s judgment in the case of *Marckx v Belgium* is exemplary of the first positive outcome deriving from the development of positive obligations in relation to family life.⁴¹⁸ Having established that the relationship between a single mother and

⁴¹² L. Lavrysen, ‘The scope of rights and the scope of obligations – Positive obligations’ in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2014), 162.

⁴¹³ *Marckx v Belgium*, para 21.

⁴¹⁴ Lavrysen, ‘The scope of rights’, 163.

⁴¹⁵ *Ibid.*

⁴¹⁶ D. Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP, 2002), 55.

⁴¹⁷ U. Kilkelly, ‘Protecting children’s rights under the ECHR: the role of positive obligations’ 2010 61(3) *Northern Ireland Legal Quarterly* 245-261. In Kilkelly’s view, the positive obligations approach has more generally contributed to the development of international children’s rights standards under the ECHR.

⁴¹⁸ See also *Kroon and Others v the Netherlands*. In this case, the applicants – the mother (Mrs Kroon), the biological father (Mr Zerrouk) and the child (Samir) – were unable to obtain recognition of the second applicant’s paternity of the third applicant due to the presumption of paternity existing under Dutch legislation in favour of the husband of the mother at the time of registration of the birth. The Court agreed that the irrebuttable presumption of paternity frustrated the child’s father from being recognised and, therefore, breached the right to respect for family life of all three applicants. In reaching this conclusion, the Court held that national authorities were placed under an obligation to

her biological daughter amounted to ‘family life’, the Court further argued that States are required to “act in a manner calculated to allow those concerned to lead a normal family life”.⁴¹⁹ In the Court’s view, this entails, inter alia, the provision of legal safeguards that enable the child’s integration in his/her family from the moment of birth.⁴²⁰ Therefore, a requirement placed upon unmarried mothers to initiate legal proceedings in order to obtain official recognition of their affiliation with their children was found in violation of Article 8.

Concerning the second positive aspect of the right to respect for family life – the protection of the integrity of family ties – the obligation to take action to aid the maintenance of existing family ties has been asserted by the Court in three distinct scenarios: placement of children in public care,⁴²¹ private custody and contact arrangements, and family reunification.⁴²² Of particular relevance to the current project, the Court has long since interpreted Article 8 as imposing the positive duty to aid the reunification of natural parents with their children in post-parental/divorce

allow complete legal family ties to be formed between Mr Zerrouk and Samir as expeditiously as possible. More specifically, the Court affirmed that “‘respect’ for family life requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone” (para 40). See also *Airey v Ireland*, Application no. 6289/73, 9 October 1979. As a corollary to their positive obligation to formally recognise family relationships based on stable emotional bonds, States might be required to facilitate the separation of married couples when their relationships have unrecoverably broken down.

⁴¹⁹ *Marckx v Belgium*, para 31.

⁴²⁰ *Ibid.*

⁴²¹ Concerning public care, the Court has consistently underlined that the placement of a child in public care does not automatically terminate the natural family relationship. Therefore, the State is expected to play a positive role not only in the pre-proceedings stage and throughout care proceedings, but also after the adoption of a care order. In line with the guiding principle whereby a care order should be regarded as a temporary solution, in the latter phase, the positive obligation upon States consists in taking measures with a view to reunite the children previously placed in public care with their natural parents. In more practical terms, “the minimum to be expected of the authorities is to examine the situation anew from time to time to see whether there has been any improvement in the family’s situation” (*K and T v Finland*, Application no. 25702/94, 27 April 2000, para 179). Moreover, the Court has long since interpreted Article 8 as imposing procedural obligations upon domestic governmental authorities, when deciding upon the placement of children in public care. For instance, see *W. v United Kingdom*, Application No. 9749/82, 8 July 1987, para 63, where the Court held that States are demanded to create decision-making systems which secure that the views and interests of the natural parents are made known to and duly taken into account by the local authorities. See also *Scozzari and Giunta v Italy*, Application No. 39221/98 41963/98, 13 July 2000, para 208. Clearly, this position is premised on the awareness of the potential distress caused by serious measures encroaching upon a sphere as delicate and sensitive as family life; and, consequently, of the potential irreversible implications for the intactness of the natural family, which is considered the ideal setting for child rearing.

⁴²² In the realm of family reunification, the Court has been called to determine whether an effective protection of the right to respect for family life compels the State to admit to its territory relatives of settled immigrants. See *Gul v Switzerland*, Application No. 23218/94, 19 February 1996; *Sen v the Netherlands*, Application No. 31465/96, 21 December 2001; *Tuquabo-Tekle and Others v the Netherlands*, Application No. 60665/00, 1 December 2005. In all three cases, the Court stated that, in order to establish whether a violation of Article 8 has occurred, it is necessary to determine whether a fair balance has been struck between the competing between the applicants’ interest to be reunited with their children and the State’s own interest to control immigration.

situations. For instance, in the case of *Hokkanen v Finland*,⁴²³ the children of the applicant had been placed in custody of his parents, following the death of their mother. The grandparents ultimately refused to return the children to the applicant and opposed any contact initiated by him. The situation was left unresolved for a long time and, eventually, the national courts transferred legal custody of the children to their grandparents. The Court established that Article 8 implied an obligation on the State to take action to bring about the reunion of parent and child. Although it was clarified that the rights and interests of all concerned – in particular, the best interests of the child – are to be taken into account, national authorities must make every effort to facilitate cooperation of all parties involved.⁴²⁴

Once it is established that there has been an interference with Article 8(1), the Court moves on to examine whether such interference is justified (second stage of analysis). Indeed, Article 8 is a qualified right and, as such, has concomitant limitations expressed within the right itself. More specifically, Article 8(2) lays down the conditions upon which a State can interfere with the protected right. Limitations are allowed if they are “in accordance with the law” and “necessary in a democratic society in the interests of national security, well being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others”.

In the context of family law – as in relation to other Convention rights – it has been observed that, the intensity of the assessment of proportionality depends, to a great extent, on the doctrine of the margin of appreciation.⁴²⁵ The width of the margin, in turn, tends to be influenced by the factual circumstances of the case.⁴²⁶ Among the latter, it is worth mentioning the textual provisions of the Convention rights, the existence of any common ground between the Contracting States, the legitimate aim of the interference, the seriousness of the interference, the existence of ethical and moral issues as well as the likelihood of financial implications.⁴²⁷ As a rule, the wider is the margin enjoyed by the State, the less restrictive is the test of proportionality employed and viceversa.

⁴²³ *Hokkanen v Finland*, Application no. 19823/92, 23 September 1994.

⁴²⁴ *Ibid.*, para 62.

⁴²⁵ Choudhry and Herring, ‘European Human Rights and Family Law’, 27.

⁴²⁶ *Ibid.*

⁴²⁷ The impact of each of these specific factors on the width of the margin is carefully explained by Choudhry and Herring, ‘European Human Rights and Family Law’, 15-26.

In relation to the decision to place a child in public care or to commence adoption proceedings, the Court has generally granted a wide margin of appreciation to States on the ground that national authorities are better placed (thanks to their direct contact) than an international court to assess the needs of the parties affected.⁴²⁸ In this specific range of cases, however, it is not always possible to draw a causal link between the width of the margin and the intensity of the proportionality assessment.⁴²⁹ Indeed, although the decision to remove the child is likely to fall within the wide margin of the State, the decision-making process is generally subject to some scrutiny.⁴³⁰ The same dynamic can be observed in relation to private arrangements, at least to a certain extent.⁴³¹ When decisions regarding contact are at stake – differently from when decisions concerning the award of custody rights are at stake – the Court commonly applies a stricter proportionality test.⁴³² Overall, it can be argued that when the measure under scrutiny is particularly restrictive or has potentially irreversible effects on the preservation of the family ties, the Court will apply the ‘sufficiency test’.⁴³³ Furthermore, it is argued, when undertaken, this test will only be met if the Court deems the measure to be in the child’s best interests.⁴³⁴

However, as pointed out by Choudhry and Herring, the most widely applied test of proportionality in family law cases is the ‘fair balance test’ and, therefore, the least strict.⁴³⁵ In this regard, the *Evans* case⁴³⁶ – which will be examined in more detail in Chapter 2 – constitutes a clear example of the relationship between the doctrine of proportionality and the doctrine of the margin of appreciation. The legal issue at stake was whether the applicant should be allowed to use her fertilised embryos despite her former partner (sperm donor)’s withdrawal of consent. The Grand Chamber held that, given the lack of a European common ground on the issue at stake and the fact that the national rules struck a fair balance between the various interests at stake, there had been no violation of Article 8.⁴³⁷ In reaching its conclusion, therefore, the Court chose to grant a

⁴²⁸ *Ibid.*, 20.

⁴²⁹ *Ibid.*, 21.

⁴³⁰ Arai-Takahashi, ‘The Margin of Appreciation and the Principle of Proportionality’, 65.

⁴³¹ Choudhry and Herring, ‘European Human Rights and Family Law’, 21.

⁴³² *Ibid.*

⁴³³ *Ibid.*, 31.

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*, 32.

⁴³⁶ *Evans v the United Kingdom*, Application No. 6339/05, 7 March 2006 (Chamber); 10 April 2007 (Grand Chamber).

⁴³⁷ *Evans v UK* (GC), paras 91-92.

wide margin of appreciation to the State and, consequently, to undertake the most lenient standard of review.⁴³⁸

It is critical to stress that the above considerations apply not only to negative duties, but also to positive obligations concerning the protection of family life between a parent and a child. As expressed in *Hokkanen*, positive obligations are not absolute. Just like negative obligations, positive obligations are subject to the application of the doctrine of the margin of appreciation and its relationship with the doctrine of proportionality.⁴³⁹ This has two main, interrelated implications. Firstly, the State might enjoy a certain margin of appreciation also in the realm of positive obligations; and, the wider is the margin, the narrower is the extent of the positive obligation imposed on the State. Secondly, regard must be given to the proportionality principle, also in the context of positive obligations. In this regard, Lavrysen points out that, while the Court's approach to negative obligations has diligently followed a two-step analysis (establishment of whether there is an interference and, if so, whether the interference is justified), these two steps are often merged in cases involving positive obligations.⁴⁴⁰ In the latter, the Court tends to do no more than assess whether, all in all, a State's inaction has not upset a fair balance.⁴⁴¹

It is argued that the balancing approach, which is typical of the ECHR machinery, has the potential to allow for an "express recognition and separation out of specific individual rights",⁴⁴² thus revealing the different values at stake. It follows that, the (failed) undertaking of a balancing exercise can be held indicative of the extent to which the Court has given consideration to all parties affected. However, this might not be enough, especially with respect to the best interests of the child. One of the dangers of the vague formulation of this principle is that it can leave room for other principles and policies to craftily exercise influence on its interpretation; similarly, when upholding this standard, judges might simply assess a child's best interests in accordance with

⁴³⁸ Choudhry and Herring, 'European Human Rights and Family Law', 33.

⁴³⁹ *Ibid.*, 10.

⁴⁴⁰ Lavrysen, 'The scope of rights', 165.

⁴⁴¹ *Ibid.*

⁴⁴² A. Bainham, 'Can we protect children and protect their rights?' 2002 *Family Law* 288.

their own value system and not in light of the evidence.⁴⁴³ In other words, there is an inevitable “element of values and hence subjectivity”.⁴⁴⁴

For instance, it is argued that, in post-divorce scenarios, courts have sometimes assumed a total overlap of the interests of the child with those of the mother, thus automatically reserving an inferior status to fatherhood.⁴⁴⁵ Using Théry’s word, the principle of the best interests of the child might therefore serve as an “alibi for conventional ideology”.⁴⁴⁶ Bearing this in mind, when assessing whether the Court has taken the child’s best interests into consideration, a further sub-question must be addressed: are the interests of the child assessed independently from those of the parents and in a fact-sensitive fashion, namely on the basis of the specific circumstances of the case? If not, the endorsed interpretation of the principle will potentially disclose underlying normative ideas about the ‘proper’ family arrangement and the ‘proper’ father, thus revealing the Court’s attachment or departure from the conventional model of fatherhood.

To conclude, it is relevant to mention that, although family life can extend to potential relationships that might develop between children born out of wedlock and their biological fathers, the protection of the right to respect for family life is premised on the existence of a ‘family’ and, therefore, it does not include the right to found a family. This explains why the Court considers pre-birth claims as falling within the notion of ‘private life’. The right to respect for private life protects, *inter alia*, the legal position of aspiring parents in relation to the beginning of human life and, as such, the possibility to become parents through the employment of ART.⁴⁴⁷

8.2 Article 14 and the Variables that Influence the Strictness of Review

Article 14 represents the primary ground for protection against discrimination under the Convention. Protocol 12 was aimed, *inter alia*, to introduce an independent guarantee of non-discrimination; however, due to the slow ratification process, Article 14 continues to have no

⁴⁴³ J. Tobin and R. McNair, ‘Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to allow Gay and Lesbian to Adopt?’ 2009 23 *International Journal of Law, Policy and the Family*, 114; H. Reece, ‘The Paramountcy Principle: Consensus or Construct?’ 1996 49 *Current Legal Problems* 295-296.

⁴⁴⁴ M. Freeman, *Commentary on the United Nations Convention on the Rights of the Child – Article 3: The Best Interests of the Child* (Martinus Nijhoff, 2007), 28. A further critique is that the best interests of the child are inevitably paternalistic, as they are assessed from an adult perspective (p. 50).

⁴⁴⁵ S. Choudhry and H. Fenwick, ‘Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under The Human Rights Act’ 2005 25(3) *Oxford Journal of Legal Studies* 458.

⁴⁴⁶ I. Théry, ‘The Interest of the Child’ and Regulation of Post-Divorce Family’ in C. Smart and S. Sevenhuijsen (eds.), *Child Custody and the Politics of Gender* (Routledge, 1989), 82.

⁴⁴⁷ Grabenwarter, ‘ECHR - Commentary’, 188.

“independent existence”⁴⁴⁸ and, according to its formulation, its ‘reach’ remains limited to discrimination only with respect to other Convention rights.⁴⁴⁹ In this sense, therefore, it has been argued that Article 14 contains (at least, on its face) a limited conception of legal or formal equality – as opposed to substantive equality – that ensures equal treatment only before the law of the Convention, thus not immediately concerned with all cases involving instances of social disadvantage that are grounded on a personal characteristic.⁴⁵⁰

The analytical approach adopted by the Court to assess whether there has been discrimination contrary to Article 14 is made up of two steps.⁴⁵¹ The first step, which is called the ‘comparability test’, consists in examining whether there has been differential treatment between persons or groups who are placed in a comparable situation. If this requirement is met, the Court will proceed to the ‘objective and reasonable justification test’, according to which a violation does not occur if the contested measure pursues a legitimate aim⁴⁵² and there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Unlike the legitimate aim test – which is described as “uncritical and rhetorical”⁴⁵³ and, as such, seems able to be met in every circumstance⁴⁵⁴ – it has been consistently pointed out in the literature that the Court’s approach to proportionality lacks consistency and clarity. Therefore, commentators tend to focus more on the strictness of review or the intensity of assessment, as opposed to the test of proportionality as such, as the element that determines the outcome of the case”.⁴⁵⁵

In their analysis, some authors have attempted to understand the strictness of review – be it strict, lenient and intermediary intensity – through the doctrine of the margin of appreciation.⁴⁵⁶

⁴⁴⁸ *Belgian Linguistic case*, part I-B, para 9.

⁴⁴⁹ O. Arnardóttir, ‘Discrimination as a magnifying lens – Scope and ambit under Article 14 and Protocol No. 12’ in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2014), 331.

⁴⁵⁰ Nikolaidis, ‘The Right to Equality’, 51. In addition to the so-called parasitic nature of Article 14, the fact that this provision enshrines a right not to be discriminated and, as such, is closely linked to the negative dimension of equality, explains the Court’s emphasis on formal equality. On this, see J. Gerards, ‘The Discrimination Grounds of Article 14 of the European Court of Human Rights’ 2013 13(1) *Human Rights Law Review* 99-124.

⁴⁵¹ It has been noted by some commentators that the two steps are sometimes merged or the comparability test is totally skipped. For instance, see Arnardóttir, ‘Equality and Non-Discrimination’, 39; J. Gerards, *Judicial Review in Equal Treatment Cases* (Martinus Nijhoff, 2005), 130; Van-Dijk et al., ‘Theory and Practice of the ECHR’, 1036.

⁴⁵² Different from the qualified provisions in Articles 8-11, the legitimate aim requirement of Article 14 is open-ended, namely not compelled by an exhaustive list of aims.

⁴⁵³ Arnardóttir, ‘Equality and Non-Discrimination’, 51.

⁴⁵⁴ *Ibid.*, 42-43; Arai-Takahashi, ‘The Margin of Appreciation and the Principle of Proportionality’, 11.

⁴⁵⁵ Arnardóttir, ‘Equality and Non-Discrimination’, 51.

⁴⁵⁶ For instance, Greer has linked the lack of consistency in the Court’s approach to proportionality to the “loose and unprincipled use of the margin of appreciation doctrine”. S. Greer, “‘Balancing’ and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate” 2004 63(2) *Cambridge Law Journal* 425. Other authors

Gerards has explicitly defined this doctrine as a “tool for differentiation of the intensity of the assessment”.⁴⁵⁷ In a nutshell, it has been observed that the width of the margin of appreciation enjoyed by States tends to be inversely proportional to the intensity of review conducted by the Court. More specifically, when States are granted a wide margin of appreciation, the Court is left with a limited margin of manoeuvre to carry out the objective and reasonable justification test. In such case, therefore, the Court generally undertakes a very general test of reasonableness and, often, sufficient reasons might be enough to justify a difference in treatment.⁴⁵⁸ On the contrary, when States are accorded a narrow margin of appreciation, the Court will normally undertake a full assessment, also referred to as ‘strict proportionality test’. With some exceptions, while a finding of violation is symptomatic of a stricter review, a finding of non-violation tends to reveal a more lenient review.⁴⁵⁹

Furthermore, there are cases where the intensity of review is somehow intermediary. In such cases, where Court is left “wrestling with the appropriateness of judicial intervention”,⁴⁶⁰ a careful qualitative assessment of the reasoning, in combination with the outcome of the case, helps to establish the intensity of review. Finally, it has been argued that the Court’s silence on the margin of appreciation is generally indicative of the Court’s confidence in determining the issue at stake. In other words, the Court tends to remain silent when the case at hand is straightforward and the existence of a violation or a non-violation is clear.⁴⁶¹ Thus, even silence can help understand whether the Court undertook a lenient or strict assessment.⁴⁶²

As regards factors influencing the width of the margin of appreciation and, consequently, the strictness of review in cases under Article 14, the Court has expressly mentioned the existence

conceiving the doctrine of the margin of appreciation as a tool to calibrate the intensity of the Court’s substantive review include Arnardóttir and Gerards. See Arnardóttir, ‘Equality and Non-Discrimination’, 41 and Gerards, ‘Judicial Review’, 169. It might be interesting to point out that, according to other scholars, the above reasoning can be reversed – i.e., the doctrine of the margin of appreciation can be understood from the perspective of the intensity of review. For instance, see Arai-Takahashi, ‘The Margin of Appreciation and the Principle of Proportionality’, 14.

⁴⁵⁷ Gerards, ‘Judicial Review’, 169.

⁴⁵⁸ Another reason for conducting a marginal assessment, according to Christoffersen, is the nature of the ECHR as an international treaty protecting minimum human rights standards. J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Martinus Nijhoff, 2003), 44, 68 and 69.

⁴⁵⁹ H. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence* (Kluwer Law International, 1996), 13. Among the exceptions, see *Petrovic v Austria*, Application no. 20458/92, 27 March 1998 and *Fretté v France*, Application no. 36515/97, 26 February 2002.

⁴⁶⁰ Arnardóttir, ‘Equality and Non-Discrimination’, 65.

⁴⁶¹ J. Schokkenbroek, ‘The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights’ 1998 19(1) *Human Rights Law Journal* 34 quoted by Arnardóttir, ‘Equality and Non-Discrimination’, 65.

⁴⁶² Arnardóttir, ‘Equality and Non-Discrimination’, 65.

of a common ground between the laws of the Contracting States.⁴⁶³ While the absence of a shared approach (or the existence of little common ground) on the issue under scrutiny leads to a lenient assessment, if there is a European consensus, the strictness of scrutiny varies depending on the nature of the common ground.⁴⁶⁴ If the difference in treatment is approved of by the majority of European States, the assessment will be lenient; if the disputed distinction is generally disapproved of, the Court will undertake a stricter review.⁴⁶⁵ Moreover, in many cases, the State is granted a wide margin of appreciation because the Court considers national authorities to be better placed – than itself – to take a decision *vis-à-vis* a particular situation. The invocation of the ‘better placed’ argument is generally conducive to lenient assessment.

Another variable that might affect the level of scrutiny is the badge of differentiation. Some commentators have spotted a trend towards a narrower margin of appreciation and, consequently, a stricter scrutiny in cases involving differential treatment on the basis of certain suspect grounds or classifications.⁴⁶⁶ Using the Court’s language, when a suspect ground is involved, the assessment of proportionality tends to manifest itself in its stringent version and, therefore, “very weighty reasons” are needed to justify the contested distinction.⁴⁶⁷ In such cases, as the reasons put forward to justify the treatment complained of are strictly scrutinised, the Court is more likely to find a violation of Article 14.⁴⁶⁸

In the case-law considered here, complaints of discrimination under Article 14 are brought in relation to the following personal characteristics: sex, sexual orientation and illegitimacy. The Court has explicitly characterised these grounds as suspect,⁴⁶⁹ and despite some variations, they tend to command strict scrutiny.⁴⁷⁰ Concerning sex, the judgment in *Abdulaziz, Cabales and Balkandali v UK*⁴⁷¹ represented the first instance where the Court used the formula “very weighty

⁴⁶³ *Rasmussen v Denmark*, Application no. 8777/79, 28 November 1984, para 40.

⁴⁶⁴ Gerards, ‘Judicial Review’, 172.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Inter alia*, J. Schokkenbroek, ‘The Prohibition of Discrimination in Article 14 of the Convention and the Margin of Appreciation’ 1998 19(1) *Human Rights Law Review* 22; Arnardóttir, ‘Equality and Non-Discrimination’, 141-155; Gerards, ‘Judicial Review’, 84-90.

⁴⁶⁷ The fact that the Court seems to be more concerned with distinctions that are more likely to strengthen patterns of disadvantage is indicative of the progressive development of a substantive model of equality. R. O’Connell, ‘Cinderella comes to the Ball: Article 14 and the right to non-discrimination in the ECHR’ 2009 29(2) *Legal Studies* 221. More on this in the section 8.3.

⁴⁶⁸ Gerards, ‘Judicial Review’, 180-3.

⁴⁶⁹ *Kiyutin v Russia*, Application no. 2700/10, 10 March 2011, para 63.

⁴⁷⁰ Arnardóttir, ‘Equality and Non-Discrimination’, 66.

⁴⁷¹ *Abdulaziz, Cabales and Balkandali v United Kingdom*, Application No. 9214/80, 9473/81, 9474/81, 28 May 1985.

reasons” as a prerequisite for finding a distinction compatible with Article 14. Since then, it is argued, every case involving a differentiation on the basis of sex has attracted a heightened strictness of scrutiny, although not uniformly.⁴⁷² Of particular interest to the current thesis, it has been noted that the Court has encountered some difficulties in conducting a strict review in cases involving the difference in treatment of men in the private sphere.⁴⁷³

The judgment in *Petrovic v Austria*⁴⁷⁴ is representative of this trend.⁴⁷⁵ In this case, the applicant complained that the refusal to grant him parental leave allowances, while available to mothers, violated Article 14 taken in conjunction with Article 8.⁴⁷⁶ Despite recognising the importance of sex equality and noting that very weighty reasons were needed for a distinction on grounds of sex, the Court placed greater, or even exclusive, emphasis on the factors triggering a wide margin of appreciation.⁴⁷⁷ Elements taken into consideration include: the date of the events (around 1989), the gradual process towards a more equal sharing of family responsibilities and, more importantly, the existence of a significant disparity between the legal regulations of European States in the field of parental leave allowances. In light of this, the Court did not apply the “very weighty reasons” test; rather, it conducted a lenient assessment, which led to the difference in treatment being justified.⁴⁷⁸ As a result, the factor ‘suspect ground’ was overruled by the doctrine of the margin of appreciation.

⁴⁷² Arnardóttir, ‘Equality and Non-Discrimination’, 142 and 146; Arai-Takahashi, ‘The Margin of Appreciation and the Principle of Proportionality’, 169-170.

⁴⁷³ Arnardóttir, ‘Equality and Non-Discrimination’, 144-145. This, moreover, points to the social situation of the applicant – whether it is disadvantaged or privileged – as another variable that, through its interplays with the other influencing factors, contributes to determining the strictness of review. See Arnardóttir, ‘Equality and Non-Discrimination’, 164-168.

⁴⁷⁴ *Petrovic v Austria*, Application no. 20458/92, 27 March 1998. This judgment will be analysed in more detail in Chapter 4.

⁴⁷⁵ An earlier example is represented by the judgment in *Rasmussen v Denmark*, where the legal issue at stake was whether the existence of a statutory time limit for husbands to contest paternity of a child born within wedlock, while wives could initiate paternity proceedings at any time, amounted to discrimination on grounds of sex. The Court started from the assumption that husbands and wives were placed in analogous situations (para 37) and went on to assess the distinguishing characteristics between their respective positions and interests under the objective justification test. It was observed that the State enjoyed a certain margin of appreciation since no common ground between the laws of the Contracting States could be found (paras 40-41). As a result, the Court failed to critically review and accepted the justification advanced by the Government, according to which the distinction was grounded on “the notion that such time-limits were less necessary for wives than for husbands since the mother's interests usually coincided with those of the child, she being awarded custody in most cases of divorce or separation” (para 41).

⁴⁷⁶ Another example is *Fretté v France*.

⁴⁷⁷ Arnardóttir, ‘Equality and Non-Discrimination’, 145.

⁴⁷⁸ *Ibid.*

The fact that the situation of men in the private sphere is less sensitive to a full assessment than other issues of sex discrimination becomes even more evident if the judgment in *Petrovic* is compared to cases involving discrimination against men in the public sphere.⁴⁷⁹ For instance, in the case of *Van Raalte v the Netherlands*,⁴⁸⁰ the Court held that, although the State enjoyed a wide margin of appreciation regarding the regulation of exemptions from contributory payments, “compelling reasons” were needed to justify that unmarried childless men over the age of 45 were required to pay contributions under the Child Care Benefits Act, while women of the same age were exempt.⁴⁸¹ To support this distinction, the Government submitted, *inter alia*, that women of 45 years or above were less likely to have children than men of the same age and that expecting the same contribution from women would “impose an unfair emotional burden on them”.⁴⁸² The Court concluded that the above reasons could not provide a justification for the gender-based difference in treatment suffered by the applicant. In so doing, the Court refused traditional and stereotypical notions to the detriment of men as objective and reasonable justifications of distinctions on grounds of sex.

However, it must be noted that the *Petrovic* judgment was overturned in the relatively recent case of *Markin v Russia*.⁴⁸³ In this case, the Court concluded that the refusal to confer parental leave on military servicemen, while the leave was available to servicewomen, breached the applicant’s right to respect for family life taken in conjunction with Article 14. Along the lines of its decision in *Van Raalte*, but more explicitly, the Court held that “gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment”.⁴⁸⁴ Therefore, it can be argued that the finding of a violation in the case of *Markin* has at least contributed to reducing the distances between the Court’s approach to the situation of men in the private and public spheres, respectively.

Concerning ‘illegitimacy’, where it is the child the victim of differential treatment, the Court has often emphasised evolutions in national legal systems and international instruments

⁴⁷⁹ *Ibid*, 146.

⁴⁸⁰ *Van Raalte v the Netherlands*, Application no. 20060/92, 21 February 1967.

⁴⁸¹ *Ibid*, para 42.

⁴⁸² *Ibid*, para 37.

⁴⁸³ *Konstantin Markin v Russia*, Application no. 30078/06, 7 October 2010 (Chamber), 22 March 2012 (Grand Chamber).

⁴⁸⁴ *Markin v Russia* (GC), para 153.

requiring equality between children born within and outside wedlock and applied strict scrutiny.⁴⁸⁵ Since its landmark judgment in the case of *Marckx v Belgium*, the Court has required – although, not always explicitly – very weighty reasons to justify a difference in treatment based on whether the child was born from a marital relationship or not.⁴⁸⁶ However, it is debated whether the same strict review is undertaken when it is the father who suffers discrimination. In the case of *McMichael v the United Kingdom*, the Court stated that the difference in treatment, according to which a married father held parental rights automatically, while an unmarried father had to submit an application and obtain the mother’s consent, pursued the legitimate aim of identifying meritorious fathers, thus protecting the interests of the child and the mother, and met the proportionality test.⁴⁸⁷ However, already in the case of *Hoffmann v Germany*, the Court required very weighty reasons to justify discrimination with respect to contact rights between unmarried fathers and divorced fathers.⁴⁸⁸ More specifically, the Court was not persuaded by the stereotypical arguments which were advanced by the Government – in other words, unmarried fathers were generally uninterested in maintaining contact with their children and might leave a non-marital relationship at any time – and found a violation of Article 14 taken in conjunction with Article 8.⁴⁸⁹

Finally, with regards to sexual orientation, it is widely argued that the judgment in *Salgueiro da Silva Mouta v Portugal*⁴⁹⁰ asserts, for the first time, that sexual orientation amounts to a suspect category, thus attracting strict review.⁴⁹¹ Drawing on the passages of the contested national decision, the Court observed that the applicant’s homosexuality had played a decisive role in the final decision in refusing his request for the custody of his child.⁴⁹² It went on to state that a distinction grounded on sexual orientation “is not acceptable under the Convention”⁴⁹³ and a violation of Article 8 taken in conjunction with Article 14 had occurred. Differently, in the case of

⁴⁸⁵ Arnardóttir, ‘Equality and Non-Discrimination’, 148.

⁴⁸⁶ For instance, see *Inze v Austria*, Application no. 8695/79, 28 October 1987, para 41; *Vermeire v Belgium*, Application no. 12849/87, 29 November 1991, para 25; *Mazurek v France*, Application no. 34406/97, 1 February 2000, para 54 (no good reason for discrimination based on adulterine birth).

⁴⁸⁷ *McMichael v the UK*, Application no. 16424/90, 24 February 1995.

⁴⁸⁸ *Hoffmann v Germany*, Application no. 34045/96, 11 October 2001, para 56.

⁴⁸⁹ *Ibid.*, para 57.

⁴⁹⁰ *Salgueiro da Silva Mouta v Portugal*, Application no. 33290/96, 21 December 1999.

⁴⁹¹ Arnardóttir, ‘Equality and Non-Discrimination’, 153-4; Nikolaidis, ‘The Right to Equality’, 59.

⁴⁹² *Salgueiro v Portugal*, para 35.

⁴⁹³ *Ibid.*, para 36.

Fretté v France,⁴⁹⁴ concerning the refusal to authorise a single homosexual man to adopt a child, the Court found no violation of Article 14. Despite the outcome, the Court classified sexual orientation as a suspect ground and affirmed that very weighty reasons had to be put forward to justify a distinction on that specific ground. However, similar to the *Petrovic* judgment, the factor ‘suspect ground’ was overruled by the lack of a European common ground among the Contracting States on whether homosexual should be granted access to adoption.⁴⁹⁵ The status of European consensus, in combination with the fact that “the law appears to be in a transitional stage”,⁴⁹⁶ led to the conclusion that the State enjoyed a wide margin of appreciation. Hence, a lenient assessment was undertaken.

However, it must be noted that, in the case of *E.B. v France*,⁴⁹⁷ which overturned the *Fretté* decision, the Court seems to have reverted back to its position in the *Salgueiro* judgment. In the case of *E.B.*, the decisive role played by the applicant’s sexual orientation in determining the rejection of her application for authorisation to adopt was inferred from the national authorities’ recurrent references to the ‘lack of a paternal reference’. The Court concluded that, given the need for very weighty reasons to justify differential treatment on grounds of sexual orientation, a narrow margin of appreciation was enjoyed by the Respondent State and, ultimately, found a violation of Article 14, taken in conjunction with Article 8. This case-law clarifies that sexual orientation, just like any other badge of differentiation, does not automatically and uniformly requires strict scrutiny. Rather, the ground of discrimination represents only one factor among the multiple variables that can influence the intensity of the Court’s assessment.⁴⁹⁸

Although factors determining the suspectness of grounds fall outside the scope of the current investigation, it is interesting to mention the role of the evolutive and comparative methods of interpretation in the development of the jurisprudence on suspect discrimination.⁴⁹⁹ For instance, it is by expressly referring to the advancement of the equality of the sexes as a major goal in the Member States of the Council of Europe that the Court justifies the need for a strict assessment in cases involving discrimination based on sex or gender. The presence of a common

⁴⁹⁴ *Fretté v. France*, Application No. 36515/97, 26 February 2002.

⁴⁹⁵ *Fretté v. France*, para 41.

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *E.B. v France*, Application no. 43546/02, 22 January 2008.

⁴⁹⁸ Arnardóttir, ‘Equality and Non-Discrimination’, 155; Gerards, ‘Judicial Review’, 218.

⁴⁹⁹ O. Arnardóttir, ‘The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights’ 2014 14 *Human Rights Law Review* 650.

ground in the laws of Contracting States has proved equally decisive for the applicability of the very weighty reasons test to birth outside wedlock.⁵⁰⁰ Throughout the time, however, the Court seems to have reexamined the desirability of relying on the existence of a common ground as the only starting point for choosing the strictness of its review.⁵⁰¹ Recent case-law exhibits a greater willingness to define the discrimination grounds and their implications for the width of the margin of appreciation in a more accurate and explicit manner.⁵⁰² As argued by Arnardóttir, the Court tends to increasingly provide more substantial justifications for undertaking strict scrutiny by, *inter alia*, placing value on the fact that certain distinctions come from stereotypical and traditional views of gender roles.⁵⁰³

Similar to the development of the scope of Article 8, the evolution of the right to non-discrimination under Article 14 constitutes further evidence of the difficulties encountered by the Court in ensuring a balance between the two apparently contradictory and yet complimentary approaches of judicial activism and judicial restraint.⁵⁰⁴ Moreover, the jurisprudence on Article 8 taken alone or in conjunction with Article 14 is also a good starting point to illustrate how a substantive conception of equality has penetrated the reasoning of the Court without attracting express acknowledgment.⁵⁰⁵ Taking the jurisprudence concerning homosexuality as an example, the following section will illustrate how far the Court has gone in extending the ambit of the prohibition of discrimination. In the view of Nikolaidis, the Court has almost gone so far as to establish ‘freedom from prejudice and stereotyping’ as a distinct human interest animating the application of Article 14.⁵⁰⁶

8.3 Toward Substantive Equality and Anti-Stereotyping

Despite the parasitic nature of Article 14, the Court has tended to apply and interpret this provision in an effective manner.⁵⁰⁷ Since its judgment in the *Belgian Linguistic* case, the Court has considered that the applicability of Article 14 does not necessarily presuppose the violation of another Convention right, provided that the claim falls ‘within the ambit’ of that Convention

⁵⁰⁰ For instance, see *Inze v Austria*, Application no. 8695/79, 28 October 1987, para 41.

⁵⁰¹ On the advantages and disadvantages of the sole use of the common ground factor, see Gerards, ‘Equal Treatment’, 208-9.

⁵⁰² Arnardóttir, ‘The Differences that Make a Difference’.

⁵⁰³ *Ibid.*

⁵⁰⁴ Nikolaidis, ‘The Right to Equality’, 53.

⁵⁰⁵ *Ibid.*, 57.

⁵⁰⁶ *Ibid.*, 63.

⁵⁰⁷ Harris et al., ‘Law of the ECHR’, 787; O’Connell, ‘Cinderella comes to the Ball’, 228.

right.⁵⁰⁸ Moreover, it is argued that, particularly over the last decade, the Court has made great strides in developing a right to substantive equality within its case-law.⁵⁰⁹ Although there are various substantive conceptions of equality, this paradigm tends to be concerned with “the effects of the law in reality, rather than questions of whether the law on paper makes distinctions”.⁵¹⁰ As explained by Nikolaidis, substantive equality requires not only prohibiting an unjustifiable difference in treatment (like formal or legal equality), but also enabling individuals to pursue their life options in an autonomous manner, namely “free from (...) prejudice and stereotyping and lack of reasonable accommodation relating to their personal characteristics”.⁵¹¹ Therefore, different from legal equality, which can be seen as a means to an end, substantive equality is an end in itself.⁵¹²

According to Nikolaidis, one way through which the Court’s approach to equality has become more substantive has consisted in conflating discrimination with other claims brought under Article 8.⁵¹³ This pattern is particularly evident in the jurisprudence pertaining to homosexuality. Until the judgment in *Salgueiro v Portugal*, the Court consistently refused to consider cases of prejudice against homosexuals through the lens of discrimination.⁵¹⁴ Instead, it used to proceed by arguing that, since sexual life was a component of private life, the distinction contested (such as, the criminalisation of private homosexual acts) breached Article 8.⁵¹⁵ Although refusing to examine a claim under Article 14 entails the risk of minimising the importance of addressing systematic prejudice and stereotypes in society, dealing with discrimination claims through Article 8 has had the positive consequence of liberating the development of anti-discrimination jurisprudence from the literal texture of Article 14.⁵¹⁶ More specifically, it is argued, it has resulted in emphasising that anti-discrimination is not only about ensuring equal enjoyment of Convention rights (treating likes alike), but also about ensuring that individuals can pursue opportunities without being subject to social oppression on the basis of sex, race and other personal characteristics.⁵¹⁷

⁵⁰⁸ Harris et al., ‘Law of the ECHR’, 787; Arnardóttir, ‘Discrimination as a magnifying lens’, 334.

⁵⁰⁹ Nikolaidis, ‘The Right to Equality’, see chapter 2; Arnardóttir, ‘The Differences that Make a Difference’, 669.

⁵¹⁰ O’Connell, ‘Cinderella comes to the Ball’, 213.

⁵¹¹ Nikolaidis, ‘The Right to Equality’, 52.

⁵¹² *Ibid.*

⁵¹³ *Ibid.*, 57-59.

⁵¹⁴ *Ibid.*, 58-59.

⁵¹⁵ For instance, *Dudgeon v UK*, Application no. 7525/76, 22 October 1981.

⁵¹⁶ Nikolaidis, ‘The Right to Equality’, 59.

⁵¹⁷ *Ibid.*

Another technique for extending the scope of Article 14 has involved employing discrimination as a “magnifying lens”, as effectively argued by Arnardóttir.⁵¹⁸ For our purpose, it is sufficient to share two out of the three distinct ways – as identified by this author – in which the interpretation of Article 14 has contributed to reinterpreting the ambit doctrine, with the ultimate effect of magnifying Article 8. Firstly, in some cases, where Article 8 was in fact applicable, Article 14 has resulted in a further violation or operated as an aggravating factor.⁵¹⁹ Once again, the case of *Marckx v Belgium* can be used as an example of this approach. The recognition of a mother-child relationship clearly fell within the scope of Article 8. However, since the law distinguished between ‘legitimate’ and ‘illegitimate’ families, the Court found also a violation of Article 14 taken in conjunction with Article 8.

The second kind of magnifying effect consists in relying on the ground of discrimination in order to make a claim fall within the ambit of a Convention right.⁵²⁰ An example is provided by the case of *Fretté v France*. Although acknowledging that Article 8 does not encompass either the right to adopt or the right to found a family (and, as such, Article 8 on its own could not be declared applicable), the Court decided to consider the claim under Article 14 since French law allowed single individuals to adopt but not Mr Fretté because of his sexual orientation. Despite a different outcome, a similar approach was adopted in the case of *E.B. v France*, where the Court held that the prohibition of non-discrimination enshrined in Article 14 “applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide”.⁵²¹ Therefore, although Article 8 on its own could not be declared applicable, the Court found a violation of Article 14 taken in conjunction with Article 8 on the ground that the French Government protected the additional right to adopt by taking discriminatory measures.⁵²² This kind of magnifying effect becomes visible in cases, like *E.B.*, where a State decides to accord protection to a certain interest in the form of a ‘right’ in its national legislation,

⁵¹⁸ Arnardóttir, ‘Discrimination as a magnifying lens’, 335-338.

⁵¹⁹ *Ibid*, 335.

⁵²⁰ *Ibid*, 337. Moreover, although not directly relevant to the current inquiry, it must be noted that the Court’s endorsement of a substantive version of equality is closely linked to the development of positive obligations under Article 14. In addition to the positive duty not to discriminate when going beyond the core of the Convention provisions, Nikolaidis identifies three additional obligations: the duty to amend the law following a finding of a violation; the duty to foster social inclusion by accommodating difference; the duty to investigate the existence of a potential link between an act of violence and intolerance against the personal features of the victims. See Nikolaidis, ‘The Right to Equality’, 73-83.

⁵²¹ *E.B. v France*, para 48.

⁵²² *Ibid*, para 49.

although not required and therefore above the minimum standards established by the Convention.⁵²³

Although challenging from a strictly methodological viewpoint, these judgments demonstrate the Court's eagerness to address instances of social disadvantage suffered by homosexuals and, therefore, to review cases based on prejudice and stereotyping.⁵²⁴ This attitude becomes particularly evident by the efforts of the Court to unveil hidden discriminatory motives underlying a specific treatment. Indeed, in both cases, the treatment of the applicants was found to be based on the applicants' sexual orientation even if the contested decisions actually referred to Mr Fretté's "choice of lifestyle" and "the lack of a paternal reference" and "the ambivalent commitment of each member of the household" in the case of *E.B.* The Court's search for prejudiced motives reveals that, under the ECHR system, a distinction can be discriminatory not only in its form, but also with respect to the powerful forces which give rise to it.⁵²⁵

Another method used by the Court to develop a substantive conception of equality has consisted in placing emphasis on the systemic implications of the discrimination claim in order to determine whether a certain treatment is justified or not.⁵²⁶ In such cases, the Court has proceeded with analysing the specific case with respect to the situation of the whole group to which the applicant belongs. Once again, the judgment in *Marckx* exemplifies this approach. In response to the arguments of the Government, which described unmarried mothers as generally more irresponsible and justified the lack of automatic recognition of the maternal filiation tie on the basis of the child's best interests, the Court refused to accept generalisations about the behaviour of unmarried mothers as a justification for the contested distinction. To a further extent, the Court's efforts to take systemic implications into account have gone as far as to highlight the history of disadvantage suffered by a specific group to narrow down the margin of appreciation enjoyed by States, thus leaving them almost no room for justifying differential treatment.⁵²⁷

⁵²³ Arnardóttir, 'Discrimination as a magnifying lens', 337. In other words, the State is not obliged under Article 8 to ensure the right to adopt in order to promote respect for family life; but, when it decides to do so, it must do it in a non-discriminatory manner. Although the Court established that the State is under the positive obligation not to discriminate when it goes beyond the requirements of the Convention, it is important to note that this positive obligation is closely tied to a formal version of equality since it aims to ensure equal treatment in the enjoyment of rights. Thus, the State can validly accomplish its duty by simply ensuring that no one benefits from any extra protection of the Convention rights. Nikolaidis, 'The Right to Equality', 74.

⁵²⁴ Nikolaidis, 'The Right to Equality', 61-62.

⁵²⁵ *Ibid.*, 69.

⁵²⁶ *Ibid.*

⁵²⁷ *Kiyutin v Russia*, Application no. 2700/10, 10 March 2011.

This systemic examination of the discrimination complaint has not gone unnoticed. Within the Court itself, the dissenting opinion of Judge Borrego Borrego in the case of *D.H. and Others v Czech Republic* sheds light on the close links between such approach and the potential departure of the Court from its judicial role.⁵²⁸ The dissenting judge criticised the majority of the Grand Chamber for taking up a new role consisting in assessing the overall social context, rather than (limiting its task to) examining individual applications.⁵²⁹ In this case, which concerned the placement of Roma children in ‘special’ schools, the majority held that “as a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantage and vulnerable minority”.⁵³⁰ Even more problematic in Judge Borrego Borrego’s view, the Grand Chamber concluded that there was no need to examine the individual cases of the applicants “since it has been established that the relevant legislation (...) had a disproportionately prejudicial effect on the Roma community” and, therefore, “the applicants as members of that community necessarily suffered the same discriminatory treatment.”⁵³¹ It is clear that, by constructing social exclusion and lack of opportunity as something that disadvantages not only the individual applicants but also the whole group that they belong to, the approach taken by the majority pursues a goal of substantive equality, which according to Judge Borrego Borrego exceeds the mandate of the Court.

Another example of the Court’s increased attention to the systemic implications of the discrimination claim is represented by the Grand Chamber’s judgment in the case of *Markin v Russia*. Apart from grounding the overturning of *Petrovic* on the evolution of legislation in the Member States towards extending parental leave allowances to men, the Court insists on the detrimental consequences of stereotyping. In particular, it states that excluding fathers from parental leave entitlements would perpetuate the stereotypical images of women as primary caretakers and of men as breadwinners.⁵³² As elaborated by Arnardóttir, this judgment displays a ‘new social-contextual approach’.⁵³³ In other words, it spells out the previously implicit *ratio legis* behind the suspect badge of differentiation, thus making it explicit.⁵³⁴ In her view, this

⁵²⁸ *D.H. and Others v Czech Republic*, Application no. 57325/00, 13 November 2007.

⁵²⁹ *Ibid*, Dissenting Opinion of Judge Borrego Borrego, para 7.

⁵³⁰ *Ibid*, para 182.

⁵³¹ *Ibid*, para 209.

⁵³² *Markin v Russia* (Grand Chamber), para 141.

⁵³³ Arnardóttir, ‘The Differences that Make a Difference’, 663-665.

⁵³⁴ *Ibid*, 664.

development is to be welcomed as it makes the substantive dimensions of Article 14 more evident than before, thus bringing about clarity and consistency in the case-law.⁵³⁵

Along similar lines, Timmer asks the Court to continuously search for the underlying social dynamics and beliefs which have led to the cases brought to its attention.⁵³⁶ This approach is made under the assumption that the Court has the potential to “change the way we speak – and thereby influence the way we think – about stereotypes and gender ideology”, thus ultimately transforming the reality in which we live.⁵³⁷ In so arguing, she calls for the Court’s adoption of a ‘transformative’ conception of equality which, in addition to calling for increasing positive equality duties on States, places emphasis on and addresses the root causes of disadvantage.⁵³⁸ As Timmer herself recognises, her definition of transformative equality does not differ from what many scholars – for instance, Nikolaidis as illustrated in the quote above – classify as substantive equality.⁵³⁹ Hence, for current purposes, substantive equality and transformative equality are used interchangeably and they are associated with a notion of the role of the law as fighting gender stereotypes, as opposed to compensating for existing gender role differences.

On the contrary, a formal version of equality – which is premised on the atomistic definition of the ‘liberal subject’ – tends to be tied with a conservative role of the law since it has proved to mirror power relations, thus entrenching the *status quo*, despite being an equality model. Although it has been at times praised for rejecting undue ‘special treatments’ (based on asserted gender differences which, rather than favouring the alleged beneficiaries, result in their marginalisation), the mere prohibition of discrimination has proved highly inadequate to oppose or contest structural patterns of domination and subordination. As explained by Fineman, a formal equality framework is primarily intended to identify the victim and the perpetrator of discrimination, the individual injury as well as the intent underpinning each specific occurrence.⁵⁴⁰ As a result, there is no room for considerations related to systemic aspects of societal arrangements. The adoption of a similar framework has also fundamental repercussions on the role of the State and its relationship to institutions and individuals.⁵⁴¹ Formal equality frameworks are likely to adopt a gender-neutral

⁵³⁵ *Ibid.*

⁵³⁶ Timmer, ‘Toward an Anti-Stereotyping Approach’, 737.

⁵³⁷ *Ibid.*, 728.

⁵³⁸ *Ibid.*, 713.

⁵³⁹ *Ibid.*, 712.

⁵⁴⁰ Fineman, ‘Beyond Identities’, 1726.

⁵⁴¹ Formal conceptions of equality are criticised for their unwillingness to engage with the public-private divide. See N. Bamforth, M. Malik and C. O’Cinneide, *Discrimination Law: Theory and Context, Text and Materials* (Sweet and

approach over distinctions; therefore, they tend to disfavour States' positive action as a means of redressing past disadvantage or, at best, they accept it as a justified form of discrimination.⁵⁴² Differently, a substantive model of equality imposes positive equality duties on the State and, as such, views positive action as essential to address structural discrimination.⁵⁴³

Within the more specific realm of gender, Timmer argues that the ECtHR has a two-fold role to play in tackling structural discrimination.⁵⁴⁴ Firstly, it should not ground its own reasoning on stereotypes and, more precisely, on gender stereotypes.⁵⁴⁵ As understood by Cook and Cusack, a stereotype is a "generalised view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular group".⁵⁴⁶ And, more specifically, gender stereotypes are those "concerned with the social and cultural construction of men and women, due to their different physical, biological, sexual and social functions".⁵⁴⁷ Secondly, the Court should 'name' gender stereotypes, whenever relied upon at the national level, and 'contest' their discriminatory effects.⁵⁴⁸

In order to facilitate the Court's undertaking of an anti-stereotyping approach, Timmer has attempted to identify specific steps through which the Court can ultimately contribute to eliminating gender stereotypes. Her methodology encompasses two phases: naming and contesting. Naming, as originally devised by Cook and Cusack and subsequently re-elaborated by Timmer, constitutes a fundamental device for "revealing an otherwise hidden harm, explaining its implications, and labelling it as a human rights concern, grievance, or possible human rights violation".⁵⁴⁹ It is, indeed, difficult for someone to lodge a complaint, if this individual does not know that his/her experience is recognised as a wrong. In addition to contributing to raising awareness of the socially persistent and pervasive forms of gender stereotyping, 'naming' also helps shed light on the ways through which gender stereotypes harm both men and women.⁵⁵⁰

Maxwell, 2008), 205; Lacey, N., 'Feminist Legal Theory and the Rights of Women' in K. Knop (ed.), *Gender and Human Rights* (OUP, 2004), 22.

⁵⁴² O'Connell, 'Cinderella comes to the Ball', 226.

⁵⁴³ S. Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide Resources' (2005) 21(2) *South African Journal on Human Rights* 166-169.

⁵⁴⁴ Timmer, 'Toward an Anti-Stereotyping Approach', 717.

⁵⁴⁵ *Ibid.*

⁵⁴⁶ R. Cook and S. Cusack, *Gender Stereotyping – Transnational Legal Perspectives* (University of Pennsylvania Press, 2010), 9.

⁵⁴⁷ *Ibid.*, 20.

⁵⁴⁸ Timmer, 'Toward an Anti-Stereotyping Approach', 717.

⁵⁴⁹ Cook and Cusack, 'Gender Stereotyping', 39.

⁵⁵⁰ *Ibid.*, 41.

Two questions are particularly emblematic of the inquiry conducted during the naming process⁵⁵¹:

- How does a law, policy or practice stereotype men or women?
- How does the application, enforcement or perpetuation of a gender stereotype in a law, policy or practice harm men or women?

In brief, the ‘naming’ process entails identifying and exposing forms of gender stereotyping, for which it is of crucial importance to engage in a careful analysis of facts.⁵⁵² It is made of a series of steps. Firstly, ‘naming’ requires examining the contexts where gender stereotypes operate and their means of perpetuation.⁵⁵³ In order to do so, specific attention should be drawn to situational (how the individual is affected by social contexts, such as the family and the employment sector) and broader factors (for example, industrialisation, broader social context of patriarchy) that are relevant to the production and reproduction of gender stereotypes.⁵⁵⁴ Secondly, it is essential to shed light on the current effects of the stereotypes.⁵⁵⁵ In so doing, “it is important that efforts to identify operative gender stereotypes extend to stereotypes of both men and women”.⁵⁵⁶ The third step consists in ‘unmasking the stereotype’, thus spelling out its negative consequences and the State’s international obligations to combat gender stereotypes.⁵⁵⁷

The second phase, which consists in contesting the ‘named’ stereotype, similarly translates into four main steps. In accordance with the anti-stereotyping approach developed by Timmer, the first lies in declaring Article 14 applicable.⁵⁵⁸ The underlying assumption is that, if a specific matter is pervaded by harmful gender stereotypes about a certain group of individuals, the prohibition of discrimination under Article 14 applies.⁵⁵⁹ The following two steps are almost mechanical. As a general rule, when a provision or practice is grounded on gender stereotypes, the Court undertakes an intensive review.⁵⁶⁰ In other words, very weighty reasons have to be put

⁵⁵¹ *Ibid*, 42.

⁵⁵² *Ibid*, 46.

⁵⁵³ *Ibid*, 54-58.

⁵⁵⁴ *Ibid*, 32-33. For the sake of completeness, Cook and Cusack also mention ‘individual factors’, such as cognitive and behavioural considerations, among the context of gender stereotypes. However, these factors do not seem relevant for the purposes of the present analysis.

⁵⁵⁵ Timmer, ‘Toward an Anti-Stereotyping Approach’, 721.

⁵⁵⁶ Cook and Cusack, ‘Gender Stereotyping’, 51.

⁵⁵⁷ Timmer, ‘Toward an Anti-Stereotyping Approach’, 722.

⁵⁵⁸ *Ibid*.

⁵⁵⁹ *Ibid*.

⁵⁶⁰ *Ibid*, 723.

forward by the State to justify the difference in treatment and, as a result, the State is granted a narrow margin of appreciation.⁵⁶¹ Furthermore, the comparability test should be replaced by the disadvantage test.⁵⁶² The latter is argued to be more appropriate for cases based on gender stereotypes because an appropriate comparator is not always present and the harm they inflict on both men and women is proof itself of disadvantage.⁵⁶³ As a result, once it is established that a gender stereotype is operative, the Court can almost automatically conclude that there is a disadvantage.⁵⁶⁴ The fourth, and final, stage of the contesting phase concerns the justifications advanced by the State for its actions. In order to bring an anti-stereotyping analysis to an end, the Court should investigate the reasons put forward and dismiss appeals to culture, traditional practices and images as insufficient grounds for differential treatment.⁵⁶⁵

To the extent that stereotypes ignore ‘individuality’ and ascribe to an individual’s specific features and roles only by virtue of his/her membership in a particular group, the impact of gender stereotyping on the protection of fathers’ right to respect for family life is of immediate understanding. It is widely recognised that the reliance on gender stereotypes has significantly contributed to denying fathers the opportunity to be involved in childcare, both *de facto* and *de jure*. For instance, it can be observed that women’s allegedly ‘natural’ predisposition to family work has for a long time concealed the need for gender-neutral parental leave. Hence, the relevance of the above anti-stereotyping approach to assess the version of equality promoted in the case-law pertaining to fatherhood and, consequently, the extent to which the Convention has been used a tool for merely compensating for existing differences or, rather, for transforming the reality.⁵⁶⁶

While in Timmer’s framework, each step is intended as necessary and indispensable to ensure a successful anti-stereotyping analysis, for current purposes, the Court’s degree of departure from a conventional understanding of fatherhood will be tested against a simplified version of the

⁵⁶¹ *Ibid.*

⁵⁶² *Ibid.*

⁵⁶³ *Ibid.*, 724. The employment of a disadvantage test as opposed to a comparability test reflects a broader move away from the need for a comparator in anti-discrimination law. The need for a male comparator is one of the limitations of understanding equality as sameness. As one can easily imagine, such approach became particularly problematic *vis-à-vis* claims related to pregnancy and maternity, where finding a similarly situated male comparator proved difficult. On this, see S. Fredman, ‘Reversing Roles: Bringing Men into the Frame’ 2014 10(4) *International Law in Context* 445.

⁵⁶⁴ Timmer, ‘Toward an Anti-Stereotyping Approach’, 724.

⁵⁶⁵ *Ibid.*, 725.

⁵⁶⁶ On the law as a conservative discipline, see M. Fineman, ‘Feminist Theory and Law’ 1995 18(2) *Harvard Journal of Law and Public Policy* 350-351.

methodology described above. This choice is justified by the aim of the present analysis: the Court's jurisprudence is not scrutinised with respect to its ability to effectively eradicate gender stereotypes as a whole but rather to contest the stereotypes which deny the applicant the enjoyment of the right to respect for his family life in the specific case under review. Therefore, the multiple steps envisaged by Timmer are considered merely indicative of a successful anti-stereotyping perspective, rather than prescriptive. Accordingly, the Court will be considered to have adopted an anti-stereotyping approach if it proves aware of an operative gender stereotype and contests it by finding a violation of Article 14 taken in conjunction with Article 8.

9. Recap of Research Questions addressed by the Thesis

Prior to embarking on the analysis of the Court's case-law, it seems useful to recap the multiple sub-questions and goals that will guide the following jurisprudential investigation:

- What features of conventional fatherhood are affirmed, revised or abandoned or not?
- How does the Court deal, or fails to deal, with the concept of fragmented fatherhood?
- Does the Court understand the law as a reflective or a transformative tool? And, what is the role of the doctrine of the margin of appreciation and of the interpretation of the Convention as a living instrument in supporting one or the other concept of the law?
- Does the Court properly take into account all affected parties when shaping its jurisprudence?

CHAPTER 2 – Donating Fatherhood: Who is the ‘Father’ in the Context of Assisted Reproductive Technologies?

Introduction

This chapter will attempt to assess to what extent the Court’s jurisprudence pertaining to ART has reproduced or departed from a conventional understanding of fatherhood, as described in the previous chapter. The chapter is made of three main parts. Section 1 describes the reactions of national authorities to the advent of ART and the latter’s impact on the legal determination of parenthood and, more specifically, of fatherhood within domestic legal systems. Section 2 will shift the debate around fatherhood and ART from the national setting to Strasbourg. This part will therefore consist in the analysis of the paradigmatic cases, where the Court was called on to discuss the determination of legal fatherhood *vis-à-vis* the employment of various reproductive techniques, including sperm donation, in vitro fertilisation (IVF) and surrogacy. To conclude, Section 3 will attempt to pull these strings together by identifying what features of conventional fatherhood persist or give way to others, which ones are abandoned or adapted. This step will also enable me to assess which of the national trends outlined in Section 1 fits better with the Court’s approach and, thus, to what extent the Court is either leading or following legal changes at the national level.

1. The Impact of ART on Parenthood and National Legal Responses

Popular culture thinks of individuals as having two parents, one mother and one father, each of whom is partly responsible for the child’s biological inheritance.⁵⁶⁷ It is no coincidence that the heterosexual two-parent family has been traditionally considered the ‘norm’ by the law.⁵⁶⁸ In the real world, however, this conventional pattern of parenting can be bypassed in a variety of different ways, including adoption, fostering and extra-pair mating.⁵⁶⁹ In modern times, ART have unsettled the traditional reproductive process by enabling individuals and couples – whether infertile or not – to reproduce and become parents, thanks to medical assistance and the intervention of third

⁵⁶⁷ M. Johnson, ‘A Biological Perspective on Parenthood’, in A. Bainham, S. Day Selater, M. Richards, *What is a parent? A socio-legal analysis* (Oxford, Hart, 1999), 47.

⁵⁶⁸ The concept of ‘normality’ that presupposes biology is discussed by K. O’Donovan, “‘Real’ Mothers for Abandoned Children” (2002) 36(2) *Law & Society Review*, 347-378.

⁵⁶⁹ Johnson, ‘A Biological Perspective’, 48.

parties.⁵⁷⁰ By further challenging the ‘norm’ resulting from biology, reproductive medicine offers the opportunity for a constructive reconsideration of the determining factor(s) in the legal assignment of parental status.

The existing body of knowledge exploring the impact of bioethics on parenthood has primarily focused on the choices or roles of women in artificial procreative situations, such as surrogacy and IVF.⁵⁷¹ Some authors appreciate and welcome ART because they offer more reproductive opportunities to women.⁵⁷² On the contrary, others criticise these technologies as a way through which patriarchal societies exercise further control on the reproductive life and choices of women.⁵⁷³ These techniques have the power to commodify both women and children: women can be reduced to wombs, or “fetal containers”.⁵⁷⁴ New possibilities entail further lines of control by essentially making it even more difficult for women to escape societal expectations and choose the deviant path of non-motherhood.

Despite the heightened interest in fathers’ issues, very few scholars have investigated the implications of modern techniques on the notion of ‘fatherhood’.⁵⁷⁵ This lack of research is partly explained by the fact that many of the authors, who have attempted a gendered analysis of parenthood in the context of ART, have applied a strictly feminist lens.⁵⁷⁶ Additionally, the central emphasis on motherhood might reflect the existing differences between the biological functions of males and females, in terms of temporal and physical involvement in the procreation process.⁵⁷⁷ Finally, the omission of fatherhood in the debate might result from sexist customs that assume the mother-child relationship to be characterised by a more intrinsic and irreversible connection than

⁵⁷⁰ B. Feuillet-Liger, ‘Preface’ in B. Feuillet-Liger, T. Callus and K. Orfali (eds.), *Reproductive Technology and Changing Perceptions of Parenthood around the world* (Bruylant, 2014), 23.

⁵⁷¹ *Inter alia*, M. Stanworth (ed.), *Reproductive Technologies: Gender, Motherhood and Medicine* (Polity, 1987); R. Arditti, R. Duelli Klein and S. Minden (eds.), *Test-Tube Women: What Future for Motherhood?* (Pandora Press, 1984); B. Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (Norton and Co., 1990).
⁵⁷² More generally, on the new freedoms entailed by ART see J. Robertson, ‘Genetic Selection of Offspring Characteristics’ 1996 76(3) *Boston University Law Review* 421-482; M. Ertman, ‘The Upside of Baby Markets’ in M. Goodwin (ed.), *Baby Markets and the New Politics of Creating Families* (CUP, 2010), 23-40.

⁵⁷³ See, *inter alia*, J. Raymond, *Women as Wombs: Reproductive Technologies and the Battle Over Women’s Freedom* (Harper, 1993); C. Gena, *The mother machine: reproductive technologies – from artificial insemination to artificial wombs* (Harper and Row, 1985).

⁵⁷⁴ M. Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (Routledge, 1995), 217.

⁵⁷⁵ D. Callahan, ‘Bioethics and Fatherhood’ 1992 *Utah Law Review* 735.

⁵⁷⁶ S. Sheldon, ‘Fragmenting Fatherhood: The Regulation of Reproductive Technologies’ 2005 68(4) *Modern Law Review*, 526.

⁵⁷⁷ M. Shultz, ‘Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality’ (1990) *Wisconsin Law Review*, 312.

the relationship that exists between father and child.⁵⁷⁸ In light of these considerations, it appears interesting to examine how medical progress has contributed to the fragmentation of the traditional ‘father figure’ and thus to redefining the legal conception of ‘fatherhood’, which has traditionally followed the genetic connection.

However, prior to embarking on a father-specific investigation, this introductory section will explain how the advent of ART has challenged the primacy of blood ties in defining parenthood and granting legitimacy to family ties. In a study on American kinship, Schneider described blood ties as “facts of life” belonging to a “natural order”.⁵⁷⁹ Interestingly, he went on to argue that blood relationships are “relationship(s) of substance, of shared biogenetic material”.⁵⁸⁰ Different to marital ties, which can be severed by divorce, the parent-child relationship is not capable of being definitely dissolved because biology and genetics are deemed irrefutable scientific facts by the dominant culture.⁵⁸¹ This emphasis on blood ties has permeated and strongly determined not only accounts of American kinship, but also blood and genes have consistently represented the ‘natural’ and the best situations for child rearing in European discourses.⁵⁸²

Adoption emerged as the first context where the logic of biogenetics showed its limits to reflect the variety of family forms currently existing in society. In more recent times, the development of ART has forced legal operators worldwide to rethink parenthood – more specifically, who has rights to the resulting child and who is excluded – beyond the rule of biology.⁵⁸³ It has also required legal mechanisms to move beyond the two-parent heterosexual family model, namely the idea that a child might only have one mother and one father. By allowing the introduction of third parties into the reproduction process and, to some degree, into the child’s environment, reproductive medicine contributes to the on-going debates – previously discussed in

⁵⁷⁸ *Ibid.*

⁵⁷⁹ D. Schneider, *American Kinship: A Cultural Account* (1980), 26.

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Ibid.*, 24.

⁵⁸² For instance, see O’Donovan, “‘Real’ mothers”, 359. Having regard to the English context, O’Donovan has emphasised that discussions of adoption, identity, and the establishment of contact on reaching adulthood tend to refer to the birth giver as the ‘real’ mother. ‘Real’, in O’Donovan’s opinion, “can only be understood in the context of cultural interpretations that blood makes relationships real”. More generally, a similar obsession with consanguinity has figured prominently in debates around the child’s right to access to his/her origins, regardless of the reason underlying the missing overlap between genetic parentage and social parenthood.

⁵⁸³ L. Sharp, ‘Blood Ties, Bioethics and the Bright-line of the Law’ in B. Feuillet-Liger, T. Callus and K. Orfali (eds.), *Reproductive Technology and Changing Perceptions of Parenthood around the world* (Bruylant, 2014), 17.

the context of adoption and step-families – around the idea of multi-parenthood.⁵⁸⁴ Apart from providing for an easier resolution of conflicts between interested parties, overcoming the bi-parental family norm might also result in a more respectful approach to what Sharp calls “sentimentality”;⁵⁸⁵ in other words, the bioethical era brings precious opportunities to revise legalistic logics to better incorporate important affective understandings of care, nurture and, even, love.⁵⁸⁶

The question of who, in the eyes of the law, is the child’s parent was already fraught with difficulties before the advent of new methods of reproduction. Only the establishment of maternity seemed to follow a clear rule – *mater semper certa est* – since based on a simple fact of nature, the mother is the one who gives birth. To a certain extent, however, the natural fact of parturition is no longer capable of establishing a clear maternal connection. In cases of ART using an egg donor, the mother who gives birth is not the biological mother; hence, the distinction between a biological mother and a gestational mother.⁵⁸⁷ Furthermore, surrogacy scenarios are able to produce as many as three maternal figures: the biological mother, the gestational mother and the social mother, namely the woman (commissioning mother) who has resorted to ART in order to reproduce. In those jurisdictions where surrogacy is allowed, the legal determination of motherhood is likely to stem from a voluntary act by the commissioning mother, rather than from biology. Even more worrisome, fatherhood is an altogether complex and fragmented status. The question whether children born of sperm donation should be granted the right to know the identity of their biological fathers has provoked much debate in several jurisdictions. And many other issues regarding men’s rights and obligations in ART scenarios have been brought before the courts.

Apart from shedding light on the fallibility of biology as a bright-line test to determine legal parenthood, reproductive medicine questions the heterosexual nature of parenthood.⁵⁸⁸ The voices of homosexuals willing to become parents have become increasingly louder in several European States, which can also be traced to the desexualisation of reproduction allowed by ART.⁵⁸⁹ Lesbian couples can now fulfil their desire to become parents by employing sperm

⁵⁸⁴ M. Jacobs, ‘Why Just Two? Disaggregating Traditional Parental Rights and Responsibility to Recognize Multiple Parents’ 2007 9 *Journal of Law and Family Studies* 309.

⁵⁸⁵ *Ibid.*

⁵⁸⁶ *Ibid.*

⁵⁸⁷ Feuillet-Liger, ‘Preface’, 24.

⁵⁸⁸ *Ibid.*, 25.

⁵⁸⁹ *Ibid.* Despite offering the chance to become parents to a wide audience of either infertile or homosexual couples and individuals, ART prescribe two major access limitations: high costs for services and the discretion of providers

donation, while male couples are enabled to have a child through surrogacy. This development has also triggered the issue of the interchangeable nature of parenthood, namely the option for one person to change from his/her legal status of father or mother to the other one following a gender reassignment.⁵⁹⁰ In all of these scenarios, the status of parent is granted to a person, irrespective of his/her gender; hence, the traditional continuum between gender and parenthood is broken.

There are many more issues which States have been called on to address, as a result of ART. Despite the fact that medical advancement is almost identical in all countries, legal responses vary significantly from country to country depending on the concept of parentage held by each country as well as on how the relationships between individual rights, family structures and societal organisation are conceived.⁵⁹¹ Germany, France and the UK offer three distinct but equally instructive approaches. While the German legal system remains ultimately centred upon the importance of blood ties in the name of the best interests of the child, France has adopted a diametrically opposed stance by attributing primary importance to intentionality. The approach taken by the UK legislator provides for a middle-ground solution: while valuing intention, it still makes legal parenthood contingent on its resemblance to the conventional family.

In addition to revealing a continuing emphasis on the mother-father relationship as a determining factor of legal fatherhood, the German reaction to ART also shows a persistent fixation on biological truth.⁵⁹² The underlying value that the German legal system attempts to promote is the dignity of a child born as a result of ART.⁵⁹³ Therefore, the child's best interests are given absolute or, at least, frequent priority over the interests of science.⁵⁹⁴ In line with this approach, the law ensures the indivisibility of maternity by prohibiting both surrogacy and egg donations.⁵⁹⁵ Although these practices are prohibited under national law, the resort to cross-border

as to whom to treat (which, in the US, mainly resonate with limitations based on marital status and limitations based on ethnicity and race). See J. Daar, 'Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms' 2013 23(1) *Berkeley Journal of Gender, Law and Justice* 35-45.

⁵⁹⁰ Feuillet-Liger, 'Preface', 25.

⁵⁹¹ F. Dekeuwer-Défossez, 'Concluding Thoughts' in B. Feuillet-Liger, T. Callus and K. Orfali (eds.), *Reproductive Technology and Changing Perceptions of Parenthood around the world* (Bruylant, 2014), 379.

⁵⁹² F. Furkel, 'The Impact of Biomedicine on Parenthood in Germany or the Obsession of the Biological Truth' in B. Feuillet-Liger, T. Callus and K. Orfali (eds.), *Reproductive Technology and Changing Perceptions of Parenthood around the world* (Bruylant, 2014), 60.

⁵⁹³ Furkel, 'The Impact of Biomedicine in Germany', 35.

⁵⁹⁴ *Ibid.*

⁵⁹⁵ *Ibid.*, 37-38. Although surrogacy is prohibited, the resort to cross-border surrogacy by German couples has not triggered any real debate. Different from other countries, such as France, German authorities do not generally oppose the transcription of foreign birth certificates and, therefore, the commissioning parents are recognised as legal parents under German law. See Furkel, 'The Impact of Biomedicine in Germany', 48-49.

surrogacy arrangements by German couples has not triggered any real debate. Different from other countries, such as France and Italy, German authorities generally do not oppose the transcription of foreign birth certificates and, therefore, the commissioning parents are recognised as legal parents under German law.⁵⁹⁶ It is sufficient to recall a ruling of December 2014, where the German Federal Court of Justice ordered the civil registry office to register a child's birth certificate and recognised the appellants – a same-sex couple in a registered partnership – as joint legal parents, in accordance with a Californian judgment.⁵⁹⁷

In its reasoning, the Federal Court of Justice stressed that German public policy was not breached by the mere fact that legal parenthood was conferred on the intended parents in a case of surrogacy, provided that one intended parent was also the child's biological father and the surrogate mother had no genetic link with the child. In this particular case, given that the surrogate mother was not married, the biological father was able to acknowledge paternity with no complications. Moreover, since the surrogate mother did not wish to assume parental responsibilities and, therefore, there was no tension between her and the second intended parent, the Court concluded that depriving the child of a legal relationship with the second intended parent was not in his best interests. As a result, in the context of surrogacy, parental intention has been given priority over gestation, but only if supplemented with one partner's genetic relatedness.

Despite the assumption that each child should be connected with his/her maternal genetic lineage, the law has not equally opposed the divisibility of fatherhood, as artificial insemination and IVF are lawful in Germany.⁵⁹⁸ The Federal Medical Association devoted its full attention to the consequences of using gametes of a third-party donor only in 2006. Given the primary importance attributed to the dignity of the resulting offspring, one peculiarity of the German regulation of heterologous ART lies in the possibility for the child to have the donor's anonymity reversed.⁵⁹⁹ Therefore, the doctor who takes care of the procedure has the duty to create a file including the identity as well as non-identifying information concerning the donor.⁶⁰⁰

⁵⁹⁶ Furkel, 'The Impact of Biomedicine in Germany', 48-49.

⁵⁹⁷ Federal Court of Justice, 10 December 2014, available online at <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2014&Sort=3&anz=193&pos=1&nr=69759&link=ed=bes&Blank=1&file=dokument.pdf> (last access on 14 July 2015).

⁵⁹⁸ Furkel, 'The Impact of Biomedicine in Germany', 37-38.

⁵⁹⁹ *Ibid.*, 43.

⁶⁰⁰ *Ibid.* This file must be stored for thirty years, after which the child is no longer allowed to access this information.

Despite ensuring the child's right to know his/her biological origins, the directives issued by the Federal Medical Association have failed to consider the consequences of the split of paternal functions over two men as a result of sperm donation. In cases involving both married and unmarried couples, this gap has been filled by the general law, which provides for a presumption of paternity.⁶⁰¹ As a result, the mother's husband or male partner is *ipso jure* the legal father of the child born from artificial insemination. Moreover, as provided by a reform introduced in 2002, neither the mother nor her husband/partner is allowed to contest paternity when they had consented to the heterologous treatment.⁶⁰²

This reform was supposed to prevent scenarios where a child born from artificial insemination was left without a legal father (and, possibly, financial support) and, therefore, to protect donors from actions seeking to establish paternity.⁶⁰³ However, the possibility to rebut the marital presumption remains on the part of the child. Following an action brought by the child, the judge can therefore declare the paternity of the donor in accordance with the results of DNA tests.⁶⁰⁴ As of now, therefore, there is no provision that effectively protects donors. Unsurprisingly, this legislative lacuna has resulted in a drastic reduction of sperm donors, possibly in line with the State's desire to reduce the employment of heterologous techniques as much as possible.

The German legislator's refusal to safely protect donors reveals profound anxieties over the risks of departing from the conventional definition of fatherhood entailed by ART; it attempts to deny the fragmentation of fatherhood brought about by heterologous techniques and, accordingly, to cover possible disconnections between biological fatherhood, marital fatherhood and nurturing fatherhood. Overall, it seems that the definition of fatherhood emerging from the German regulation of ART closely resembles the characters of either marital fatherhood or biological fatherhood, depending on whether the child chooses to bring an action to rebut the marital presumption. If he/she does not, priority is given to the existence of a connection between the alleged father and the child's legal mother. Otherwise (upon the child's request), DNA evidence has the potential to bring a shift from a legal definition based on marriage to a legal

⁶⁰¹ *Ibid.*, 44.

⁶⁰² *Ibid.*, 46.

⁶⁰³ *Ibid.*

⁶⁰⁴ *Ibid.*

definition based on genes.⁶⁰⁵ In the name of the best interests of the child, the search for the biological truth goes as far as to exclude *de facto* the anonymity of a sperm donor and to make him financially responsible for the child following a judicial determination of his paternity.⁶⁰⁶

Different from the trend identified in German law, French law has witnessed a progressive elimination of biological ties and a concomitant emphasis on intention as the basis for determining legal parenthood.⁶⁰⁷ In the context of ART, reliance on biological ties is totally ruled out by the principle of donor anonymity that implies the impossibility for the child to create any *de jure* or *de facto* bond with the donor.⁶⁰⁸ The underlying idea is that of leaving the way clear to determine parenthood only on the basis of intention.⁶⁰⁹ Therefore, consent is given a key role – particularly, in cases of gamete donation – because it represents not only a prerequisite for undertaking a treatment, but also the ground whereby parenthood is established.⁶¹⁰ The prioritisation of intention over biology in the scenario of ART fits perfectly into the wider family law system, which has consistently made a distinction between biological origins and legal parentage and grounded the latter on notions of spontaneous parental acceptance.

An exception to this approach is represented by the French approach to surrogacy, which has, until very recently, generally privileged gestation over intention. Different from Germany, French couples' resort to cross-border surrogacy following its prohibition on the national territory has given rise to a heated debate in France. When confronted with intended parents' requests for

⁶⁰⁵ Dowd makes this remark referring to the law in general. See N. Dowd, 'From genes, marriage and money to nurture: redefining fatherhood' (2003-2004) 10 *Cardozo Women's Law Journal*, 132-133.

⁶⁰⁶ J. Fraser, 'Conclusion: The European Convention on Human Rights as a common European endeavour' in S. Flogaitis, T. Zwart and J. Fraser (eds.), *The European Court of Human Rights and its Discontents – Turning Criticism into Strength* (Edward Elgar, 2013), 198.

⁶⁰⁷ F. Kernaleguen, 'The Impact of Biomedicine on Parentage in French Law: Reconceiving Parentage' in B. Feuillet-Liger, T. Callus and K. Orfali (eds.), *Reproductive Technology and Changing Perceptions of Parenthood around the world* (Bruylant, 2014), 116-117. An example of this approach is represented by the peculiar institution of anonymous birth (in French, *accouchement sous X*), according to which a birth giver has the right to request that her identity be kept secret and withheld from the child's birth certificate. Historically as well in present times, anonymous birth is considered to pursue a two-fold goal: to protect the life and the health of both the woman and the child by ensuring that delivery occurs in safe medical conditions and to prevent tragic events, such as child abandonment, infanticide and abortion. Until 2002, any child born *sous X* was left with no legal opportunity to access his/her birth records and, thus, to know his/her origins. The Loi Royal (Loi 2002-92 du 22 janvier 2002 relative à l'accès aux origines des personnes adoptées et pupilles de l'Etat; law no. 2002-92 of 22 January 2002 related to the access to origins of adopted persons and children in care) enabled confidentiality to be waived and set up a special body to facilitate searches for information about biological origins. Despite this reform, the current regulation of secret makes it difficult for the child to succeed in his/her search.

⁶⁰⁸ Kernaleguen, 'The Impact of Biomedicine on Parentage in French Law', 118.

⁶⁰⁹ *Ibid.*, 119.

⁶¹⁰ *Ibid.*

the transcription of the foreign birth certificate of their children born out of surrogacy abroad into French birth registers, domestic courts have shown a tendency to consider public policy as violated by the mere fact that surrogacy had taken place. Accordingly, they refuse recognition of filiation ties of surrogate children, considering them as the product of a fraudulent process. As a result, these children have often been left stateless and parentless.⁶¹¹ This situation was also brought to the attention of the ECtHR in the cases of *Mennesson v France*⁶¹² and *Labassee v France*.⁶¹³ which found the national authorities' opposition to transcription in breach of Article 8 concerning the children's right to respect for their private life. These judgments were only implemented in the domestic legal system in July 2015, when the Court of Cassation held that surrogate motherhood cannot *per se* justify the refusal to transcribe the foreign birth certificate of a child who has a French parent into French birth registers.⁶¹⁴ Despite representing an important step forward, some commentators have argued that the Court of Cassation did not go far enough, as only the biological father – together with the birth mother – will be allowed to be registered on the birth certificate.⁶¹⁵

Similar to the mainstream approach in France, the UK legislator has, at least *prima facie*, proved able to detach itself from the English Common Law default position, which relies on biological truth to recognise paternity.⁶¹⁶ Rather, it has introduced specific legislation whereby the recognition of legal parenthood stems from the intention of parents who employ ART, thus reducing the relevance of the biological link. Nonetheless, existing provisions equally express entrenched assumptions and highly conservative understandings about what constitutes the appropriate family.⁶¹⁷ When revising the rules concerning the establishment of legal parenthood

⁶¹¹ 170 Personnalités, 'Gestation pour autrui : 2 000 enfants sans état civil reconnu', *Le Monde*, 22 December 2014 – online at http://www.liberation.fr/societe/2014/12/16/gestation-pour-autrui-2-000-enfants-sans-etat-civil-reconnu_1164970 (last access on 10 July 2015).

⁶¹² *Mennesson v France*, Application no. 65192/11, 26 June 2014.

⁶¹³ *Labassee v France*, Application no. 65941/11, 26 June 2014.

⁶¹⁴ Court of Cassation, 3 July 2015, press release : <https://www.courdecassation.fr/IMG//Press%20release%20surrogate%20motherhood.pdf> (last access on 10 July 2015).

⁶¹⁵ *Inter alia*, see I. Théry, 'GPA : la France doit prendre la maternité au sérieux', *Le Monde*, 2 July 2015 – online at http://www.lemonde.fr/idees/article/2015/07/02/gpa-acceptons-enfin-qu-il-y-ait-plus-d-une-facon-d-etre-mere_4666870_3232.html (last access on 10 July 2015). Although it was written the day before the decision of the Court of Cassation, it criticises the approach eventually taken by the Court.

⁶¹⁶ T. Callus, 'Changing Conceptions of Parenthood in English Law' in B. Feuillet-Liger, T. Callus and K. Orfali (eds.), *Reproductive Technology and Changing Perceptions of Parenthood around the world* (Bruylant, 2014), 165.

⁶¹⁷ J. McCandless and S. Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' 2010 73(2) *Modern Law Review* 175-207; Callus, 'Changing Conceptions of Parenthood in English Law', 166; L. Smith, 'Clashing symbols? Reconciling support for fathers and fatherless families after the Human Fertilisation and Embryology Act 2008' 2010 22 *Child and Family Law Quarterly* 47.

of children born out of ART, the drafters were faced with multiple questions, like whether the law should recognise two women as a child's parents; if so, on what grounds and what terminology might be the most appropriate for two parents of the same sex; and how to best recognise in law the fundamental presence of social parents in the child's life, next to those who offered biological contribution.⁶¹⁸

Eventually, the idea of the legislator was to position the child born from ART 'as if' he/she were the biological child of the two adults recognised as parents.⁶¹⁹ The underlying intent and *de facto* outcome is the persistence of the heterosexual dual parent model. According to the rules stipulated in the Human Fertilisation and Embryology Act ('HFEA 2008', which amended the 1990 Act of the same title), the legal father of the child is the husband of the mother who consented to his wife's assisted insemination.⁶²⁰ In case there is neither a legal father by virtue of marriage nor a female parent by virtue of civil partnership, an unmarried man can be recognised as the child's legal father, provided that a set of 'agreed fatherhood conditions' – which, in essence, ground legal fatherhood on consent, both the mother's and the father's – are met.⁶²¹ As a result, it is the connection of the alleged father with the child's mother, rather than a biological link between the alleged father and the child, that is decisive for establishing who the child's legal father is. Like in France, the donor is excluded from any legal parental status. However, due to the abrogation of the principle of donor anonymity in April 2005, the child has the right to know his/her identity upon the age of 18.⁶²²

Paradoxically, also the recognition of same-sex parents following the employment of ART rests upon the heterosexual dual parent model.⁶²³ One of the most innovative aspects of the HFEA 2008 lies in the possibility for two women to jointly qualify as legal parents of a child born through sperm donation since the moment of birth.⁶²⁴ Interestingly, however, both women will not be

⁶¹⁸ McCandless and Sheldon, 'The HFEA 2008', 176.

⁶¹⁹ Callus, 'Changing Conceptions of Parenthood in English Law', 166.

⁶²⁰ Section 35, HFEA 2008.

⁶²¹ Sections 36-37, HFEA 2008.

⁶²² Donor anonymity was abolished in April 2005 by the Human Fertilisation and Embryology Authority (Disclosure of Donor Regulations) 2004.

⁶²³ Callus, 'Changing Conceptions of Parenthood in English Law', 169.

⁶²⁴ It is important to link this new rule to another amendment brought by the reform to the HFEA 1990: section 14(2)(b) replaces the reference to the need for a father with the need for 'supportive parenting'. As a result, both single mothers and lesbians have been given access to ART. This amendment has been perceived by some as conveying the message that fathers are not valuable. Others have criticised the reform for departing from the heterosexual paradigm of the family. Smith, 'Clashing symbols?', 52.

recognised as legal mothers; rather, whilst the birthgiver is *ipso jure* the legal mother of the child, her partner can be recognised as ‘the other parent’ in accordance with rules that strongly resemble those regulating the establishment of fatherhood.⁶²⁵ Apart from holding the indivisibility of maternity, these provisions reiterate that, in a child’s life, there can only be one parent who enjoys the legal status of mother.⁶²⁶ It follows that, in cases of registered partnerships, the partner of the legal mother will be accorded the status of ‘other parent’ unless it is proved that she did not consent to artificial insemination.⁶²⁷ Where a woman is not in a civil partnership, her partner’s recognition as the ‘other parent’ of the child is contingent upon the performance of the treatment at a licensed clinic and the existence of ‘agreed female parenthood conditions’ (which, just like the ‘agreed fatherhood conditions’, require evidence of the parents’ intention to treat the female partner as a parent).⁶²⁸ It is interesting to note that the so-called marital presumption has been extended to scenarios where the lack of a biological link between the parent and the child is an incontrovertible fact.

In a nutshell, under the HFEA 2008, “genetics could be taken out of the equation of legal parenthood, but the latter could still only be attached to social parents able to emulate the biological, necessarily heterosexual, mother/father dyad”.⁶²⁹ This reading of the Act is also confirmed by the new provisions pertaining to parental orders following surrogacy. As a result of another novelty brought by the HFEA 2008, civil partners as well as unmarried heterosexual couples and same-sex couples not in a civil partnership are allowed to apply for a parental order, which would extinguish the rights and responsibilities of the surrogate mother (and, if relevant, the paternity of her husband) and would enable them to be recognised as legal parents of a child born through surrogacy.⁶³⁰ Among the conditions to be met in order to obtain a parental order, the

⁶²⁵ McCandless and Sheldon, ‘The HFEA 2008’, 186.

⁶²⁶ *Ibid*, 170.

⁶²⁷ Section 42, HFEA 2008.

⁶²⁸ Sections 43-44, HFEA 2008.

⁶²⁹ Smith, ‘Clashing symbols?’, 47.

⁶³⁰ Section 54, HFEA 2008. Despite being allowed under UK law, there are still a consistent number of English couples who travel overseas for surrogacy. Although the law enables commissioning parents to apply for a parental order and no request has been so far denied, it is estimated that the most surrogate-born children are unregistered and, therefore, have no legal status in the UK. One reason might be the delay that parents usually face when returning to the UK with their baby. See O. Bowcott, ‘Unregistered surrogate-born children creating ‘legal timebomb’, judge warns’, *The Guardian*, 18 May 2015 – online at <http://www.theguardian.com/lifeandstyle/2015/may/18/unregistered-surrogate-born-children-creating-legal-timebomb-judge-warns> (last access on 10 July 2015).

commissioning parents must be a couple and at least one of them has to be genetically related to the child.⁶³¹ As a result, as of now, a single person remains unable to apply for a parental order.

In addition to perpetuating the primacy of the dual parent model, the tenacious hold of the dominant ideology of the family is further demonstrated by the hierarchy set between the position of husbands and civil female partners and that of those who are not in a formalised union.⁶³² The former are indeed given priority at parental status. Only when their absence is ascertained, the judge can consider the attribution of legal parenthood to another male or female partner under the abovementioned agreed conditions. Therefore, the HFEA 2008 draws a distinction between married fathers or fathers in a registered partnership and fathers not in a formalised union. Overall, it seems that the marital or pseudo-marital relationship between the alleged father/other parent and the child's mother is a prevalent feature in the definition of fatherhood endorsed by the UK regulation of ART. If considered within a wider context, this aspect of the HFEA does not fit within the process of erosion that has affected the primacy of marriage in English family law since the 1970s.⁶³³ The roots of this inconsistency seem to lie in concerns over the threat posed by ART to the traditional ideology of the family, expressed when the HFEA 1990 was enacted.⁶³⁴ It remains, however, bizarre that the drafters of the 2008 reform have not simply preserved this distinction, but built on it.⁶³⁵

Finally, it is important to link the new rule as to 'female parenthood' to another controversial amendment brought by the 2008 reform to the text of HFEA 1990. Section 14(2)(b) of the new Act replaced the reference to the need for 'a father', previously included in Section 13(5) of HFEA 1990, with the need for 'supportive parenting' as a condition for accessing ART.⁶³⁶ Although it did not include any overt condemnation of single or lesbian motherhood, Section 13(5)

⁶³¹ Section 54(1), (2) and (8), HFEA 2008. Other conditions provide that the surrogate mother and, if relevant, her husband must freely consent to the order being issued; in order to be valid, the mother's consent has to be given six weeks after delivery; the application for parental order has to be made within six months of the birth. If none of the commissioning parents has a genetic link with the child, the only available option is adoption.

⁶³² McCandless and Sheldon, 'The HFEA 2008', 188-190.

⁶³³ *Ibid*, 186.

⁶³⁴ *Ibid*, 190.

⁶³⁵ Furthermore, the persisting focus on the form of the relationship between parents reveals that, unlike German legislation, the HFEA 2008 has been primarily concerned with the needs and desires of the adults involved and have equated children to "commodities like washing machines". T. Callus, 'First "Designer Babies", Now à La Carte Parents' 2008 38 *Family Law* 143. More generally, on the need to give due regard to the position of resulting offspring in ART regulation, see M. Sabatello, 'Are the Kids all Right? A Child-centred Approach to Assisted Reproductive Technologies' 2013 31(1) *Netherlands Quarterly Human Rights* 74-98.

⁶³⁶ As a result, licence-holders, before providing the treatment, have to consider the welfare of any resulting child as well as the welfare of any other child who might be affected by the birth.

– also known as the ‘welfare provision’ – intended to restrict access to treatment services to married couples.⁶³⁷ This amendment has been object of sustained criticism. Most of the concerns, *prima facie*, pointed to the reform’s alleged consequence of undermining the value and importance of fatherhood.⁶³⁸ More convincingly, however, it has been argued that the critiques addressed to Section 14(2)(b) underlie, once again, fears of departure from the conventional paradigm of the family.⁶³⁹ In other words, that criticism seemed to stem more from the recognition that preserving the reference would “symbolically” jeopardise the non-traditional, fatherless families recognised elsewhere in the 2008 Act.⁶⁴⁰

These examples provide an overview of the efforts invested by national legal systems in creating solutions to the numerous problems triggered by the impact of modern reproductive techniques on parenthood. They also shed light on emerging ‘new’ or recently just revisited understandings of fatherhood. All of the above national systems have shown an increased recognition of parental intention. This shift, however, has not necessarily implied a departure from conventional fatherhood. Rather, this emphasis on parental intention tends to go hand-in-hand with the persistence of a biological understanding of fatherhood. Moreover, a continuing attachment to the dual parental model and, more particularly, to the connection between the father and the child’s mother seem to remain the underlying forces guiding the attribution of legal fatherhood.

2. Moving the Debate to Strasbourg: ART as a Chance to Realise the Fragmented Nature of Fatherhood

It is precisely in relation to its case-law pertaining to ART that the Court has furthered the scope of Article 8 using what Burbergs refers to as a ‘tree-like mode’, “where one ‘branch’ is the base and support for other branches to grow”.⁶⁴¹ In particular, Burbergs observes that the right to respect the decision to/not to become a parent, established in the case of *Evans v UK*, developed into the

⁶³⁷ Smith, ‘Clashing symbols?’, 49; G. Douglas, ‘Assisted Reproduction and the Welfare of the Child’ 1993 53 *Current Legal Problems* 69.

⁶³⁸ D. Whitehead, ‘Family Law – Messages on Parenthood: The Human Fertilisation and Embryology Bill’ 2008 42(2) *The Law Teacher* 246.

⁶³⁹ Smith, ‘Clashing symbols?’, 51-53.

⁶⁴⁰ *Ibid.*, 53.

⁶⁴¹ M. Burbergs, ‘How the right to respect for private and family life, home and correspondence became the nursery in which new rights are born’ in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2014), 325.

rights to choose the circumstances of becoming a parent,⁶⁴² to choose to become a genetic parent,⁶⁴³ to access IVF,⁶⁴⁴ and finally, to become a parent through surrogacy.⁶⁴⁵ Despite this progressive expansion of the scope of Article 8 and, when relevant, the acknowledgment of the existence of family life among the applicants, the Court has, in most cases involving ART, found that Article 8 has not been violated. In this regard, it seems worth anticipating a certain role of the doctrine of the margin of appreciation in hindering the finding of a violation. Indeed, the Court has often held that, given the sensitive moral and ethical issues triggered by medical and scientific progress, together with the lack of a clear consensus among the Contracting States on these matters, the Respondent State enjoys a wide margin of appreciation.⁶⁴⁶

Although the Court never explicitly addresses the question ‘who is a father?’, the establishment of the legal tie of fatherhood has been interestingly discussed in a number of cases concerning the use of ART, where the Court has more or less indirectly emphasised the presence of specific factors as crucial for the determination of legal fatherhood. Compared to the other case-law domains that will be examined subsequently, this set of cases encompasses factual accounts that are quite different from each other. Accordingly, the following analysis will divide the existing jurisprudence into two sets of cases, depending on whether the claims brought by the applicants are pre- or post-birth. Concerning the latter, the investigation of the Court’s approach will be centred upon its decisions in *X, Y and Z v the United Kingdom*,⁶⁴⁷ *Mennesson v France* and *Labassee v France* and *Paradiso and Campanelli v Italy*.⁶⁴⁸ Whilst these cases stemmed from the applications of three want-to-be legal fathers of already born children, the following two cases concerned the hypothetical right to/not to become a father and, accordingly, discussed the appropriateness of childbirth in the given circumstances. The judgments in *Evans v the United*

⁶⁴² *Ternovzsky v Hungary*, Application no. 67545/09, 14 December 2010.

⁶⁴³ *Dickson v the United Kingdom*, Application No. 44362/04, 18 April 2006 (Chamber); 4 December 2007 (Grand Chamber).

⁶⁴⁴ *S.H. and Others v Austria*, Application no. 57813/00, 1 April 2010 (Chamber); 3 November 2011 (Grand Chamber).

⁶⁴⁵ *Mennesson v France*; *Labassee v France*; *Paradiso and Campanelli v Italy*, Application no. 25358/12, 27 January 2015 (referral to the Grand Chamber pending).

⁶⁴⁶ In addition to the cases that will be analysed in this chapter, see also *S.H. and Others v Austria*, GC, para 97.

⁶⁴⁷ *X, Y and Z v the United Kingdom*, Application No. 21830/93, 22 April 1997

⁶⁴⁸ *Paradiso and Campanelli v Italy*, Application no. 25358/12, 27 January 2015 (referral to the Grand Chamber pending).

*Kingdom*⁶⁴⁹ and *Dickson v the United Kingdom*⁶⁵⁰ are, therefore, paradigmatic of the Court's stance in relation to pre-birth claims.

This variety of scenarios implies greater possibilities for assessing the interaction of biology with other conventional features of legal fatherhood and, more generally, for measuring the tenacity of biology and other characteristics of conventional fatherhood against a variety of family forms and situations. In relation to each of them, this chapter will attempt to establish to what extent the Court has assimilated the idea of 'fragmented fatherhood' and, accordingly, has reacted to the growing distance between family realities and the conventional ideology of fatherhood. Overall, it will be shown that, in the first set of cases, there is a gradual departure from a conventional understanding of fatherhood based on the existence of a biological link between the child and the alleged father. This does not seem to be the case, however, when the child is unborn. Indeed, both the *Evans* and the *Dickson* judgments reveal a strong degree of continuity with the conventional paradigm of fatherhood, particularly concerning the relevance of biology as well as the marital link with the child's mother. A definition of fatherhood as a derivative based on his ties with the child's mother emerges also from the judgment in *X, Y and Z*, where the Court seems to place significant weight on the gender identity of the applicant when dismissing his request to obtain legal recognition of his social ties with an ART-conceived child. This, in turn, indicates a persisting attachment to a heteronormative conception of fatherhood.

2.1 *X, Y and Z v the United Kingdom* (1997): What Matters? Interplays between Gender Identity, Marriage and Biology

X, a post-operative female-to-male transsexual, had lived with the female applicant Y as her male partner since 1979. More than a decade later, X and Y applied jointly for permission for Y to undergo artificial insemination ('AI') treatment with sperm by an anonymous donor to enable Y to have a child. After an appeal, a hospital ethics committee granted permission and asked X to acknowledge himself as the father under Section 28(3) of the HFEA 1990, according to which in cases where an unmarried woman gives birth as a result of AI with the involvement of her male partner, the latter, rather than the donor of the sperm, shall for legal purposes be treated as the

⁶⁴⁹ *Evans v the United Kingdom*, Application No. 6339/05, 7 March 2006 (Chamber); 10 April 2007 (Grand Chamber)

⁶⁵⁰ *Dickson v the United Kingdom*, Application No. 44362/04, 18 April 2006 (Chamber); 4 December 2007 (Grand Chamber)

father of the child.⁶⁵¹

Nonetheless, X was not allowed to be registered as the child's legal father because, in the Registrar General's view, only a biological man could be considered a father for the purposes of registration. Before the ECtHR, the applicants argued that the relationship between X and Z amounted to family life by virtue of their close ties since Z's birth. As a result, they submitted that the lack of legal recognition of that bond amounted to a violation of Article 8 and discrimination contrary to Article 14. Conversely, the government pointed out that the union of a transsexual and partner could be equated to that of two women living together, since X was still regarded as female under domestic law. Similarly, X did not enjoy family life with Z, because he was not related to the child by blood, marriage or adoption.

The Court's analysis follows a two-tiered process, as envisaged in the previous chapter: after having established family life, it goes on to assess whether there has been a violation of Article 8. In discussing the applicability of Article 8, the Court began by addressing the issue of whether family life could be established between X and Y. It recalled that the notion of 'family life' is not confined solely to marriage-based relationships and might also include *de facto* family ties.⁶⁵² It went on to clarify that the establishment of family life is dependent upon the existence of three key factors: cohabitation,⁶⁵³ the length of the relationship, and "whether they have demonstrated their commitment to each other by having children together or by any other means".⁶⁵⁴ The first part of the analysis was successfully met through the employment of a 'reality test', aimed at assessing the existing emotional involvement between the concerned individuals

⁶⁵¹ *Ibid*, para 21. It must be noted that, at that time, English law defined a person's sex on the basis of biological facts at birth and prohibited any reassignment. The situation has been completely altered by the introduction of the Gender Recognition Act 2004, which allows for the recognition of a person's new gender, under specific conditions. A present X would therefore be able to become legally a man and, as such, would be in a position to be legally recognised as a father of Z.

⁶⁵² X, Y and Z, para 36.

⁶⁵³ It might be useful to mention that cohabitation has not always been held necessary to establish family life. For instance, see the judgment in *Kroon and Others v the Netherlands*, Application no, 1994. In this case, the applicants – the mother (Mrs Kroon), the biological father (Mr Zerrouk) and the child (Samir) – were unable to obtain recognition of the second applicant's paternity of the third applicant due to the presumption of paternity existing under Dutch legislation in favour of the husband of the mother at the time of registration of the birth. The Court noted that, although they were not living together, Mrs Kroon and Mr Zerrouk had a stable and long-standing relationship from which Samir and other three children had born. In the wake of its judgment in *Marckx*, it went on to state that national authorities were placed under an obligation to allow complete legal family ties to be formed between Mr Zerrouk and Samir as expeditiously as possible. More specifically, "respect' for family life requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone" (para 40). –

⁶⁵⁴ X, Y and Z, para 36.

and, more generally, the effective concreteness of their relationship.⁶⁵⁵ When applying this test to the circumstances of the present case, the Court held that *de facto* family ties, under Article 8, existed among the three applicants.⁶⁵⁶ This conclusion was grounded on four main considerations: X had undergone gender reassignment surgery and, as a result, looked like a man to all appearances; X and Y had lived together since 1979; they had jointly sought AI treatment in order to become parents; and X has supported Y during the treatment and had acted as Z's father since birth.⁶⁵⁷

For the purposes of the current analysis, the fact that family life is found regardless of the lack of a biological tie ought to be appreciated for valuing care (in other words, for valuing *doing* over *being*). In taking this approach, the Court went even beyond its admissibility decision in the earlier case of *J.R.M. v the Netherlands*, by stating that biology is not only insufficient, but also superfluous to establish family life.⁶⁵⁸ In *J.R.M.*, the applicant acted as a sperm donor to enable a lesbian couple to have a child, under the agreement that the child would have been raised by the couple. However, after childbirth, he decided to become involved in the child's life and applied for contact rights, against the couple's will. When faced with the applicant's claims, the Court found Article 8 inapplicable, as "the situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child."⁶⁵⁹ Despite prioritising X's close personal ties with Z over biology, it cannot be overlooked that the finding of family life between X, Y and Z was also contingent on the nature of the relationship between the adults: to all appearances, they were a male-female couple, who had cohabitated for a long time and had undertaken a parental project together.

The enthusiasm injected by the finding of family life is quickly weakened by the ultimate dismissal of the applicant's plight (in a non-violation finding) on the ground of a wide margin of appreciation enjoyed by the State. In assessing compliance with the Convention, the Court stated that Article 8 might entail positive undertakings, in addition to negative obligations. In the case of *Marckx*, for instance, Belgium had been held responsible for introducing legal safeguards to render

⁶⁵⁵ H. Stalford, 'Concepts of family law under EU law – lessons from the ECHR' (2002) 16 *International Journal of Law, Policy and the Family* 413.

⁶⁵⁶ *X, Y and Z*, para 37.

⁶⁵⁷ *Ibid.*

⁶⁵⁸ *J.R.M. v the Netherlands*, Application no. 16944/90, 8 February 1993.

⁶⁵⁹ *Ibid.*, 'The Law', para 1.

possible, from the moment of birth or as soon as practicable thereafter, the child's integration in his biological family.⁶⁶⁰ However, the Court was of the opinion that this principle could not be directly applied to the present case, since it raised different issues: different from the *Marckx* case – Z was conceived via ART and not biologically related to X, who is a transsexual.⁶⁶¹

The Court further observed that there was no common European standard with regard to the conferral of parental rights on transsexuals or the way through which the tie between an artificially-conceived child and his/her social parent should be recognised by the law.⁶⁶² According to the Court, therefore, a different approach was needed and, more specifically, one that consisted in weighing up the arguments in favour and against the legal recognition of the ties between the applicants in order to strike a fair balance between the conflicting interests of the individuals and of the community as a whole.⁶⁶³ Among the latter, emphasis was placed on the community's interest in preserving a coherent system of family law that prioritises the best interests of the child.⁶⁶⁴ However, it was not specified how denying legal recognition to the relationship between X and Z would have served the protection of this community's interest. Furthermore, the Court noted that the State could legitimately be cautious in amending the law, since the reform sought by the applicants might have had adverse repercussions in other areas of family law.⁶⁶⁵ For instance, the legal system could have been subjected to criticism on the ground of inconsistency, if a female-to-male transsexual was permitted to become a legal father, while still incapable entering into a contract of marriage with a woman.⁶⁶⁶

The Court moved on to balance the disadvantages suffered by the applicants as a result of the lack of recognition of X as the legal father of Z against these community's interests. Before this case, the Court had already placed an emphasis on the significant benefits ensuing from the legal recognition of family ties not only in the case of *Marckx*, but also in the cases of *Johnston v Ireland* and *Kroon and Others v the Netherlands*.⁶⁶⁷ In all these previous cases, the Court had made

⁶⁶⁰ *Marckx v Belgium*, Application no. 6833/74, 13 June 1979, para 31.

⁶⁶¹ *X, Y and Z*, para 43.

⁶⁶² *Ibid*, para 44.

⁶⁶³ *Ibid*, para 41.

⁶⁶⁴ *Ibid*, para 47.

⁶⁶⁵ *Ibid*.

⁶⁶⁶ *Ibid*.

⁶⁶⁷ In the wake of its judgment in *Marckx*, the Court went on to state that national authorities were placed under an obligation to allow complete legal family ties to be formed between Mr Zerrouk and Samir as expeditiously as possible. More specifically, “‘respect’ for family life requires that biological and social reality prevail over a legal

it clear that children should not be subject to disadvantages as a consequence of the parents' status. Differently, in the case of *X, Y and Z*, the Court chose to undervalue the advantages of legal recognition and, rather, to place emphasis on the means through which the applicants could reduce the obstacles they face.⁶⁶⁸ It was noted, *inter alia*, that the absence of any automatic right of inheritance in case of X's death could have been practically circumvented by making a will.⁶⁶⁹ Moreover, the Court noted that X was not prohibited from continuing to act as the social father to Z and could have obtained full parental responsibility for her by seeking joint residence.⁶⁷⁰ In light of the above, the Court found it impossible to foresee the extent to which Z's development would be negatively affected by the absence of a legal tie between her and X.⁶⁷¹

In conclusion, the Court held that "given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States", Article 8 could not, in this context, be interpreted as implying a positive obligation on the State to legally recognise as the father of a child someone who is not his/her biologic father.⁶⁷² No separate issue was found to stem from the applicants' complaint under Article 14 in conjunction with Article 8 and, accordingly, it was not considered.⁶⁷³ As envisaged in the introductory chapter, the application of the doctrine of the margin of appreciation was grounded on the rule of consensus. The establishment of the latter, however, does not come from a detailed and clear assessment.

Literally, the Court refers to "the information available to the Court"⁶⁷⁴ – presumably, the submissions of the parties and the Commission's assessment – as the only basis for finding a limited common ground among the Contracting States. Apart from failing to substantiate its statement through reference to the exact sources of knowledge or comparative data relied on, the conclusion that there was little common ground clashes not only with the evidence put forward by the applicants, but also with the account provided by the Commission. As reported in the judgment,

presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone" (para 40).

⁶⁶⁸ U. Kilkelly, 'Protecting children's rights under the ECHR: the role of positive obligations' 2010 61(3) *Northern Ireland Legal Quarterly*, 252.

⁶⁶⁹ *X, Y and Z*, para 48.

⁶⁷⁰ *Ibid.*

⁶⁷¹ *Ibid.*, para 51.

⁶⁷² *Ibid.*, para 52.

⁶⁷³ *Ibid.*, paras 55-56.

⁶⁷⁴ *Ibid.*, para 44.

the Commission had observed “a clear trend”⁶⁷⁵ among the Contracting States towards the legal recognition of gender reassignment; and, consequently, it had argued in favour of a presumption of legal recognition to the advantage of a post-operative transsexual who lived as part of a family relationship.⁶⁷⁶

Furthermore, the conclusion reached in *X, Y and Z* appears “shaky at best”,⁶⁷⁷ especially in light of the subsequent decision in *Goodwin v UK*, where the Court chose to attach less importance to the absence of a common European approach, than to the “clear and uncontested evidence of a continuing international trend in favour (...) of increased social acceptance of transsexuals”.⁶⁷⁸ Following the binary classification of the margin of appreciation proposed by Letsas, the doctrine in this case is used in its substantive version: it is indeed invoked to settle a tension between individual rights and collective interests.⁶⁷⁹ Leaving aside the obscure method used to ascertain the lack of consensus, the award of a wide margin has led to lowering the standard of review. Although most part of the reasoning is centred upon the test of proportionality and, accordingly, is invested to determine whether a fair balance had been struck between the fundamental freedoms of the applicants and public interests, the actual focus is on how difficulties faced by the applicants can be alleviated, not on their disadvantages *per se*.

With regards to the interests of the parties, the Court seems to be concerned with how to treat transsexuals rather than with how to recognise children’s family ties.⁶⁸⁰ Therefore, despite being one of the applicants, the best interests of Z were not given adequate attention; at best, they were mostly considered as overlapping with the interests of the adults. Judge Pettiti also expressed this concern in his concurring opinion, which was echoed by Judge Gotchev,⁶⁸¹ in his dissenting opinion. Possibly aware of the criticism generally brought to ART regulation (both legislative and

⁶⁷⁵ *Ibid*, para 40.

⁶⁷⁶ Similarly, Judge Foighel criticised the majority for failing to take into account that “[t]here is a growing awareness of the importance of each person’s own identity and of the need to tolerate and accept the differences between individual human beings. Furthermore, the right to privacy and the right to live, as far as possible, one’s own life undisturbed are increasingly accepted.” See Dissenting Opinion of Judge Foighel, para 5, citing his own dissenting opinion in the case of *Cossey v UK*, which was decided seven years earlier.

⁶⁷⁷ Kilkelly, ‘Protecting CRs under the ECHR’, 253.

⁶⁷⁸ *Christine Goodwin v UK*, Application no. 28957/95, 11 July 2002.

⁶⁷⁹ G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP, 2007), 84; Y. Arai-Takahashi, ‘The margin of appreciation doctrine: a theoretical analysis of Strasbourg’s variable geometry’ in G. Ulfstein, A. Follesdal and B. Peters (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP, 2013), 94.

⁶⁸⁰ Kilkelly, ‘Protecting CRs under the ECHR’, 253.

⁶⁸¹ In his view, the balancing exercise should have accorded “prevailing consideration” to the best interests of the child, regardless of the transsexuality of her social father.

judicial) as prioritising the interests of adults to the detriment of those of the resulting child, Judge Pettiti contested that the reasoning of the majority was excessively based on the personal demands of X and Y alone and on balancing the advantages and disadvantages deriving from amending, or not, Z's civil status. Furthermore, he argued that assuming that Z shared the exact same interests of her parents obscured the existence of a potential conflict of interests among them: the legal recognition of X as Z's father might, in his opinion, run counter Z's potential interest to know his biological parentage.

From a more substantive viewpoint, the finding of no violation clarifies that the establishment of family life requires less than what is needed to be granted the full legal status of fatherhood. While it is sufficient for the purposes of family life, the presence of close social ties does not apparently reach the threshold of legal fatherhood. Moreover, the Court seems to argue that a denial of legal fatherhood *per se* does not constitute a violation of family life. Having regard to the considerations of the Court throughout the second stage of analysis, the finding of no violation seems to be justified by the fact that the needs of a child can be adequately met regardless of the provision of legal recognition. However, this clashes with what was established in *Marckx*, as the Court itself observes. Thus, one of the most suspicious passages of this judgment specifically relates to the failed extension of the positive obligation to introduce legal safeguards to ensure the child's integration into his family (as established in *Marckx*) to the case of *X, Y and Z*.

The Court distinguishes between these two cases along two interrelated lines: the lack of a biological link between X and Z and the fact that X is a post-operative transsexual. In so arguing, the Court affirms that, although a relationship might fall within the notion of family life under Article 8, the positive obligation to respect such family life benefits only those linked by biological ties. Besides the lack of a biological connection, what might have actually hindered the finding of a violation of Article 8 is X's gender identity and the lack of a marital or otherwise formalised union between X and Y, as not sanctioned by the law at the material time. By arguing that the legal amendment sought by the applicants would stand in contradiction with the legal impossibility for transsexuals to marry, the Court seems to indirectly privilege marital fatherhood. In other words, in addition to reserving the respect for family life to biological ties, the Court seems to have further conditioned the establishment of a legal connection between X and Z upon the existence of a marital union between X and Y.

To conclude, contradictory messages arise from the present judgment. On the one hand,

the Court seems to reject the indispensability of a biological link by implicitly (establishing family life between them) arguing that a ‘parent’ is not necessarily the person who procreates, but the person who acts as such in a social sense.⁶⁸² In so doing, the Court brings its contribution to the already intense debate of social versus biological parenthood with respect to the best interests of the child.⁶⁸³ More precisely, the Court pushes the definition of family life beyond the conventional boundaries of biology by endorsing a functional-based test of intentionality and, implicitly, conveys the message that care is all that matters.

However, when it comes to the conferral of legal fatherhood (second stage of analysis), care is no longer sufficient; rather, biology and marriage are restated as bases for granting legal fatherhood. The lack of a biological link between X and Z as well as the absence of a formalized relationship between X and Y – both consequences of X’s gender identity – emerge as the factors that impeded the application of the *Marckx*’s judgment to the present case and, therefore, the obligation to provide the ties between X and Z with legal recognition. As a result, X and, more generally, transsexuals are put in a special category due to their gender identity. The discriminatory dimension of the case was acknowledged by, possibly, the most powerful dissenting opinion. Judge Foighel pointed out that the text of Article 8 – “everyone has the right to respect for private and family life (...)” – encompasses transsexuals.⁶⁸⁴ To prove the discriminatory nature of the case, Judge Foighel observed that had X been biologically male, he would have been entitled to register as a father despite the lack of a biological link with Z under Article 28(3) of HFEA 1990.⁶⁸⁵ As a result, at least according to his interpretation, it was X’s gender identity more than the absence of a biological link with Z that informed the majority’s finding of no violation.

Regarding the applicants’ complaint under Article 14, the Court considered it as a mere restatement of the complaint under Article 8 and, therefore, held that it was not necessary to investigate the issue again.⁶⁸⁶ Apart from failing to examine the case through the lens of discrimination, the Court itself endorses a discriminatory attitude against post-operative transsexuals. The finding of no violation signals the Court’s attachment to a conventional understanding of fatherhood, at many levels: the absence of a biological connection was expressly

⁶⁸² A. Bainham, ‘Sex, gender and fatherhood: does biology really matter?’ (1997) 56 *Cambridge Law Journal* 514.

⁶⁸³ *Ibid.*

⁶⁸⁴ *X, Y and Z*, Dissenting Opinion of Judge Foighel, para 1.

⁶⁸⁵ *Ibid.*, para 9.

⁶⁸⁶ *X, Y and Z*, para 56.

identified as justifying the failed recognition of X's and Z's social tie (as a result of the non-application of the positive obligation established in *Marckx*); similarly, although less explicitly, X's gender identity, his consequential departure from heteronormativity and, further, his impossibility to comply with the ideal of marital fatherhood seem to have played a decisive role in dismissing the applicants' request to recognise X as the legal father of Z.

What prevented a full departure from the traditional ideology of fatherhood is the problematic use of its precedent in *Marckx*. This attitude, as argued by Kilkelly, seems to reflect the Court's broader tendency to water down positive obligations when the family life at issue involves unconventional families.⁶⁸⁷ In other words, although the Court has demonstrated a strong awareness of the importance of formally recognising family ties, it has failed to extend this approach equally to all types of relationships.⁶⁸⁸ In this case, the Court seems to accept some differential treatment with respect to positive obligations not only in light of the unconventional features of the family at stake, but also on the basis of the absence of a European consensus on the issue. Thus, the lack of consensus and the doctrine of the margin of appreciation ultimately served to justify the non-application of the positive obligation to provide existing ties with legal recognition and, as such, supported the Court's persistent attachment to a conventional ideology of fatherhood.

2.2 Surrogacy Cases: A Chance to Revise the Approach Taken in *X, Y and Z v UK*

The Court has been recently called on to deliberate on the implications of international surrogacy arrangements on the right to respect for private and family life of both the intended parents and the surrogacy-born children. In the cases of *Mennesson v France*⁶⁸⁹ and *Labassee v. France*,⁶⁹⁰ the applicants – namely the couple and the child(ren) born overseas as a result of surrogacy - failed to secure recognition under French law of the legal parent-child relationship that had been legally established in the US.⁶⁹¹ The refusal to enter the birth certificates of the surrogacy-born children in the French register of births was ultimately justified by the Court of Cassation on the ground

⁶⁸⁷ Kilkelly, 'Protecting CRs under the ECHR', 251-253.

⁶⁸⁸ *Ibid*, 254.

⁶⁸⁹ *Mennesson v France*, Application no. 65192/11, 26 June 2014.

⁶⁹⁰ *Labassee v France*, Application no. 65941/11, 26 June 2014.

⁶⁹¹ In the case-law analysis, every remark shall be intended to apply to both cases (unless differently indicated), whose facts and approach taken by the Court are identical.

that recording such entries would give effect to a surrogacy agreement that was null and void on public-policy grounds under the French Civil Code.

Relying on Article 8, the applicants complained that, to the detriment of the children's best interests, their inability to obtain recognition under French law of the parent-child relationships established abroad between them breached the right to respect for their private and family life.⁶⁹² Moreover, in the case of *Mennesson*, it was further argued that, as a consequence of the refusal to grant legal recognition of their family ties, the children were discriminated against with respect to their right to respect for family life, thus violating Article 14 taken in conjunction with Article 8.⁶⁹³

When declaring the applicability of Article 8, the Court expressly referred to its previous judgment in the case of *X, Y and Z* and reaffirmed that it is the existence of concrete relationships between the individuals concerned that leads to family life.⁶⁹⁴ In both cases, it was noted that the first two applicants acted as parents towards the third applicants since their birth and that they all lived together in conditions that could not be distinguished from 'family life' in the accepted meaning of the term.⁶⁹⁵ Therefore, the Court held that the refusal of the French authorities to legally recognise the family ties among the applicants constituted an interference with their right to respect for their family life. It was also argued that the 'private life' limb of Article 8 was applicable, as the right to identity was an integral component of one's private life and, therefore, there was a strong link between the children's right to respect for private life and the determination of their legal parentage. Similar to *Z*, it must be noted that the applicant children in *Mennesson* and *Labassee* were only partially genetically related to their social parents; in fact, they had been conceived via IVF using the gametes of their father and the eggs of a donor.

When examining whether this interference was justified, the Court accepted that the refusal to recognise parent-child relationships between children born abroad from surrogacy and the intended parents pursued two legitimate aims under Article 8(2) – namely, the protection of health and protection of the rights and freedoms of others – as it sought to deter nationals from employing ART prohibited in France and, finally, to protect children and surrogate mothers.⁶⁹⁶ Nonetheless, the refusal was ultimately considered unnecessary in a democratic society, at least with respect to

⁶⁹² *Mennesson*, para 43.

⁶⁹³ *Ibid*, para 44.

⁶⁹⁴ *Ibid*, para 45. The exactly same approach was adopted in the *Labassee* case.

⁶⁹⁵ *Ibid*.

⁶⁹⁶ *Ibid*, para 62.

the children's right to respect for family life. Before embarking on the balancing exercise, the Court stressed the lack of a European consensus on the lawfulness of surrogacy arrangements or on the legal recognition of the relationship between the commissioning parents and children conceived abroad.⁶⁹⁷

The absence of consensus, together with the sensitive ethical questions raised by surrogacy, would – in principle – call for a wide margin of appreciation and, therefore, make the prohibition of surrogacy under French law compatible with the Convention.⁶⁹⁸ However, since the identity of individuals was at stake, it was argued that its width needed to be reduced.⁶⁹⁹ Therefore, by differentiating between the right to respect for family life and for private life, the Court moulds the limits of the margin of appreciation depending on whether the parents or the children are involved, possibly with the aim of adopting an approach more cautious and respectful of national choices.

The Court also had to examine whether a fair balance had been struck between the interests of the State and those of the individuals directly concerned, with particular reference to the fundamental principle according to which, whenever the situation of children is at stake, their best interests are paramount.⁷⁰⁰ When applying the proportionality test, the Court distinguished between the impact of the lack of recognition under French law on the applicants' right to respect for their family life and on the right of the children to respect for their private life, respectively.⁷⁰¹ Concerning the former, the Court concluded that the national judges had succeeded in striking a fair balance between the interests of the applicants and those of the State.

Indeed, as argued by the Court, despite the refusal to register the birth certificate in the French register, the applicants did not face any insurmountable obstacle to the daily enjoyment of their family life in France: they were all able to settle in France shortly after the birth of the children, they “are able to live together in conditions broadly comparable to those of other families” and there is nothing to suggest a risk of separation.⁷⁰² Different to the judgment in *Marckx* and others (for example, *Johnston v Ireland* and *Kroon and Others v the Netherlands*), the Court relativizes and quickly dismisses the difficulties encountered by the applicants as a result of

⁶⁹⁷ *Ibid.*, para 78.

⁶⁹⁸ *Ibid.*, para 79.

⁶⁹⁹ *Ibid.*, para 80.

⁷⁰⁰ *Ibid.*, para 81.

⁷⁰¹ *Ibid.*, para 86.

⁷⁰² *Ibid.*, para 92.

a lack of legal recognition by noting that, their living conditions were, in fact, similar to those enjoyed by other families. In so doing, the Court seems to reiterate the controversial approach adopted in the case of *X, Y and Z*: in other words, there is family life between the applicants but no positive obligation on the State to protect it. Moreover, in line with its previous judgment, the lack of a European consensus contributes to justifying differential treatment with respect to positive obligations.

On the contrary, when assessing the alleged interference with the children's right to respect for private life, the Court stressed that these children were left in a position of legal uncertainty, which undermined their identity within French society.⁷⁰³ As a result, their right to respect for private life, according to which everyone shall be able to establish details of their identity, including their legal parentage, was significantly compromised.⁷⁰⁴ The deprivation of recognition of their legal affiliation under French law was, therefore, found to run contrary to the children's best interests.⁷⁰⁵

The Court went on to state that this analysis acquires a "special dimension" when one of the intended parents is also the child's biological parent, like in the present case.⁷⁰⁶ Given the importance of biological parentage as a component of identity, the Court argued that depriving a child of the legal recognition of his/her biological parentage cannot be considered to be in the child's best interests.⁷⁰⁷ Therefore, it was concluded that, by preventing the establishment and recognition of the children's legal tie with their biological father, France had overstepped its margin of appreciation, thus violated the children's right to respect for private life.⁷⁰⁸ In view of this violation, the Court found it unnecessary to consider the applicants' complaint under Article 14.

Overall, the Court's judgment seems to reflect an underlying compromise: it is not possible to confer a right to become parents on those who have deliberately gone abroad to circumvent a prohibition under national law, but the resulting children should not suffer the adverse consequences of the decision of their intended parents.⁷⁰⁹ However, the bilateral nature of a

⁷⁰³ *Ibid*, para 96.

⁷⁰⁴ *Ibid*, para 99.

⁷⁰⁵ *Ibid*.

⁷⁰⁶ *Ibid*, para 100.

⁷⁰⁷ *Ibid*.

⁷⁰⁸ *Ibid*.

⁷⁰⁹ M. Farge, 'La filiation des enfants issus d'une GPA à l'étranger: la CEDH se livre à un bon diagnostic des incohérences du droit français, mais prescrit un remède disputable!' 2014 21 *Revue des Droit et Libertés*

filiation tie makes it difficult to punish parents without encroaching on the children at the same time.⁷¹⁰ As a result, by attempting to reconcile irreconcilable needs, the Court ends up delivering a judgment that, although appearing *prima facie* “particularly balanced”,⁷¹¹ proposes a quite limited conception of filiation and, consequently, of parenthood.⁷¹²

Indeed, although with respect to the children’s private life, the Court seems to favour a biological conception of fatherhood as compatible with the child’s best interests. In other words, according to the value system of the Court (which, in these cases, came to a unanimous decision), the legal recognition of biological parentage is a prerequisite for ensuring the respect for the children’s private life and, more generally, the realisation of their best interests. This vision of the best interests of the child serves, therefore, to restate a conventional understanding of parenthood and, more precisely, a biological conception of fatherhood, in line with Théry’s warning raised in Chapter 1.⁷¹³

Although the violation is found from the children’s perspective, it inevitably has positive implications for the biological fathers, too. However, by disregarding the bilateral nature of a filiation tie and holding that the rights of children and those of parents can be seen as independent, the Court let believe that it is possible, through the recognition of the father-child tie, to pursue the child’s best interests and to protect his right to respect for private life with no spillover on the father’s right to respect for family life.⁷¹⁴ The distinction made between the two limbs of Article 8 seems, therefore, more artificial than real. Indeed, the benefits of the legal recognition of biological fatherhood – which is the remedy suggested by the Court – do not stop at protecting the children’s right to an identity, but go as far as to formally acknowledge an existing social tie between the father and the child.⁷¹⁵

On the contrary, the Court’s finding does not help the mother at all, since she is not biologically related to the children. Rather, the emphasis on biology inevitably attributes a lower status to the intended mother, although she was involved in the parental project and enjoys social

Fondamentaux, available online at <http://www.revuedlf.com/personnes-famille/la-filiation-des-enfants-issus-dune-gpa-a-letranger-la-cedh-se-livre-a-un-bon-diagnostic-des-incoherences-du-droit-francais-mais-prescrit-un-remede-discutable-commentaire/#note-5548-19> (last access on 13 July 2015)

⁷¹⁰ *Ibid.*

⁷¹¹ *Ibid.*, citing F. Sudre, 2014 *Gaz. Pal.* n. 205.

⁷¹² Farge, ‘La filiation des enfants’.

⁷¹³ I. Théry, ‘“The Interest of the Child” and Regulation of Post-Divorce Family’ in C. Smart and S. Sevenhuijsen (eds.), *Child Custody and the Politics of Gender* (Routledge, 1989), 82.

⁷¹⁴ Farge, ‘La filiation des enfants’.

⁷¹⁵ *Ibid.*

ties with the children as much as the father. In conditioning the recognition of the father-child relationship upon biology and, even before, in finding no violation with respect to the applicants' right to respect for family life, the Court underestimates the social dimension of filiation and parenthood. As a result, the judgments in *Mennesson* and *Labassee* do not simply oppose, but rather invite States to differentiate between motherhood and fatherhood on grounds of biology.

In light of the above, it seems that, had the children been totally genetically-unrelated to their social parents, a violation of Article 8 was not going to be found. However, having regard to the Chamber's judgment in the case of *Paradiso and Campanelli v Italy*, this no longer seems to be the case. This recent decision – although not yet final (referral to the Grand Chamber pending) – is of particular interest, as the intended parents had no biological link with the surrogacy-born child. The applicants – husband and wife who had resorted to surrogacy in Russia – complained that the child's removal from them and the refusal to acknowledge the parent-child relationship established abroad by registering the child's birth certificate in Italy amounted to a violation of their right to respect for family life.

The facts are definitely more dramatic than those in *Mennesson* and *Labassee*, as the child had been taken away from the intended parents and placed under guardianship on the basis of the DNA test that indicated no link between the child and the couple. When considering the applicability of Article 8, the Court notes that the applicants spent the first stages of the child's life with him: six months in Italy, starting from his third month of life and, before then, the intended mother had already spent some weeks with the child in Russia.⁷¹⁶ Therefore, despite the short period of time, the Court concluded that the applicants had acted as parents towards the child and, therefore, *de facto* family links existed between them.⁷¹⁷

Although, in all three cases, the applicants complained of the national authorities' refusal to recognise their parent-child relationships established abroad, the primary issue upon which the Court focuses in the case of *Paradiso and Campanelli* is the child's removal from the couple and his placement under guardianship.⁷¹⁸ In so doing, the Court, once again, chooses not to analyse the case as one involving positive obligations and, therefore, does not consider the interpretation of

⁷¹⁶ *Paradiso and Campanelli*, para 69.

⁷¹⁷ *Ibid.*

⁷¹⁸ European Court of Human Rights, *Questions and Answers on the Paradiso and Campanelli v Italy judgment*, online at http://echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf (last access on 5 July 2015).

Article 8 as implying the obligation on the State to formally recognise *de facto* family ties and to protect their integrity. Notwithstanding this shortcoming in its interpretation, it still finds the child's placement for adoption disproportionate and, consequently, a violation of Article 8.

More specifically, when examining whether a fair balance had been struck between the public interest and the applicants' rights under Article 8(1), the Court reiterated the principle according to which, whenever the situation of a child is at stake, his/her best interests are paramount.⁷¹⁹ It was further stated that the principle of the best interests of the child implies that family ties can be broken only in very exceptional circumstances, like when there is a need to protect the child from an immediate danger (such as, violence), and that States must take the child's best interests into account, "regardless of the nature of the parental relationship, genetic or otherwise".⁷²⁰ In light of this, the Court concluded that the national authorities had not attached sufficient weight to the best interests of the child, when balancing them against public-policy considerations, thus breaching the applicants' right to respect for their private and family life.⁷²¹

Different to the cases against France, the Court explicitly detaches the best interests of the child from his/her biological parentage. Although a violation of Article 8 is found on the ground of the child's removal and his placement under guardianship (different from the *Mennesson* and *Labassee* cases), the Court seems to argue that the right to respect for family life and, more specifically, the right to have *de facto* ties preserved, does not presuppose the existence of a biological connection. Therefore, over a period of almost twenty years, we can observe a gradual dismissal of the conventional understanding of fatherhood, which anchors the protection of the right to respect for private and family life to biological parentage.

In *X, Y and Z*, the Court explicitly invoked the lack of a biological link between X and Y (as a distinguishing factor between the case under consideration and the precedent in *Marckx* and, as such) as a justification for not interpreting Article 8 as implying an obligation to formally recognise *de facto* family ties. Similarly, in the cases of *Mennesson* and *Labassee*, the existence of a biological link between the intended fathers and the surrogacy-born children proved decisive for finding a violation of Article 8, although from the children's private life perspective. Finally, in the case of *Paradiso and Campanelli*, any relevance of the biological connection to determine

⁷¹⁹ *Paradiso and Campanelli*, para 75.

⁷²⁰ *Ibid*, para 80. The quote is translated from French; the original text is "indépendamment de la nature du lien parental, génétique ou autre".

⁷²¹ *Ibid*, para 86.

who is entitled to protection under Article 8 is explicitly ruled out. A father and a child who enjoy *de facto* family ties are considered worthy of protection under Article 8, regardless of their biological unrelatedness. As such, the conclusion reached in 1997 is overturned in 2015.

Moreover, it is worth mentioning that the Court had dismissed the couple's application on behalf of the child for lack of standing, referring to the fact that they had no biological link with the child and they could not represent him before domestic courts.⁷²² Notwithstanding the issue of standing, the Court found that *de facto* family life existed among them and, more importantly, it took the rights of the child into consideration in reaching its conclusion. Indeed, the Court insisted on, *inter alia*, the fact that the child was deprived of any existence for more than two years (since he was denied identity papers until April 2013) to argue that his best interests had not been given due regard, thus finding a violation.⁷²³

To conclude, in none of the surrogacy cases did the Court explicitly refer to the nature and length of the relationship between the intended parents. In the French cases, legal fatherhood has been expressly constructed by virtue of Mr Mennesson's and Mr Labassee's biological tie with their children. Nonetheless, the lack of any explicit mention to the father-mother relationship should not be read as signifying the irrelevance of this factor in finding a violation, especially in the case against Italy. Rather, given that, in all three cases, the intended parents were married, the Court might have simply found it superfluous to spell out the existence of a formalised and stable union between the intended parents as one of the factors leading to establishment of family life among the applicants.

However, it is interesting to note that, in the case of *Paradiso and Campanelli*, the Court stressed the importance of taking the emotional aspects of the case into consideration.⁷²⁴ In particular, it mentions that that the couple had applied for adoption; once considered suitable to adopt in 2006, they had to wait for several years due to the limited number of available children for adoption; and, hopeless, they decided to undertake a surrogacy agreement in 2010.⁷²⁵ Having regard to the three key elements of family life identified in *X, Y and Z* – namely, cohabitation, length and presence of children – one might argue that the couple's intention and commitment to having children as demonstrated by applying for adoption and, subsequently, by resorting to cross-

⁷²² *Ibid.*, paras 45-50.

⁷²³ *Ibid.*, para 85.

⁷²⁴ *Ibid.*, para 77.

⁷²⁵ *Ibid.*

border surrogacy might have played a role in classifying their relationship with the child as ‘family life’, despite the short period of cohabitation, and ultimately in finding a violation.

2.3 *Evans v the UK*⁷²⁶ and *Dickson v the UK*⁷²⁷: Fatherhood as a Unitary Status

In July 2000, Natalie Evans (the applicant) and her partner, J., commenced fertility treatment at the Bath Assisted Conception Clinic, in the UK. In October 2001, during an appointment at the clinic, the applicant was diagnosed with pre-cancerous tumours in both ovaries and was offered one cycle of IVF treatment prior to the surgical removal of her ovaries. On the same occasion, a nurse explained that the applicant and J. would each be required to sign a consent form to undergo the treatment and that, in compliance with the provisions of the Human Fertilisation and Embryology Act 1990 (‘HFEA 1990’), it would be possible for either of them to withdraw his or her consent at any time prior to the implantation of the embryos in the applicant’s uterus. Being aware of this bright-line rule, the applicant considered whether she should opt for freezing her unfertilized eggs but J. reassured her that their relationship was not going to break down and that he wanted to be the father of her child.

In November 2001, the couple underwent IVF treatment and, as a result, six embryos were created and placed in storage. Two weeks later, the operation to remove the applicant’s ovaries was performed and she was told she would need to wait for two years before attempting any embryo’s implantation in her uterus. In May 2002, the relationship between the applicant and J. ended. He promptly informed the clinic of the separation and requested the embryos to be destroyed. Consequently, the clinic notified the applicant of J.’s withdrawal of consent to the continued storage and use of the embryos by the applicant and informed her that it was under a legal obligation to destroy them.

The applicant commenced proceedings before the High Court and sought an injunction requiring J. to restore his consent. Her claims were dismissed because J. was found to act in good faith, as he had embarked on the treatment under the assumption that his relationship with the applicant would continue. This decision was upheld by the Court of Appeal, which reiterated that J. had only ever consented to undergoing ‘treatment together’ with the applicant. Given the clarity

⁷²⁶ *Evans v the United Kingdom*, Application No. 6339/05, 7 March 2006 (Chamber); 10 April 2007 (Grand Chamber)

⁷²⁷ *Dickson v the United Kingdom*, Application No. 44362/04, 18 April 2006 (Chamber); 4 December 2007 (Grand Chamber).

of the statute, it was never likely that the national courts would interpret it to her advantage.⁷²⁸ Since leave for appeal was refused by the House of Lords, the applicant lodged an application with the ECtHR and contented that the consent rules included in the HFEA 1990 breached Articles 2, 8 and 14 in conjunction with Article 8.⁷²⁹

More specifically, she argued that, since her ovaries had been removed to fight cancer, the embryos at stake represented her only chance to have a child to whom she would be biologically related.⁷³⁰ As a result, J.'s withdrawal of consent would inevitably thwart her life's ambition to become a mother. In response to her claims, the Government submitted that the 1990 Act aimed at promoting a number of interrelated interests, including the woman's right to self-determination in respect of pregnancy once the embryo was implanted and the primacy of freely given and informed consent to medical intervention.⁷³¹ Moreover, it noted that the absence of a common European ground as well as the challenges inherent in striking a balance between the competing interests of two individuals justified a wide margin of appreciation with regards to the point at which a sperm donor should be allowed to withdraw his consent.

In summary, the Chamber stated the applicability of Article 8 on the ground that the notion of 'private life' encompasses the right to respect for both the decisions to become or not become a parent. Different from the domestic proceedings, it classified the case as one involving positive obligations, rather than an interference by the State with the applicant's right to respect for private life. The ensuing issue was, therefore, whether Article 8 entailed a positive obligation on States to ensure that a woman, who has undergone IVF treatment for the specific purpose of having a genetically-related child, is allowed to proceed to implantation regardless of the withdrawal of consent by her former partner. Given the lack of an international and European consensus with respect to the regulation of IVF treatment, the use of resulting embryos and related ethical and moral issues, the Chamber granted a wide margin of appreciation to the Respondent State and concluded that the absence of a power to override a genetic parent's withdrawal of consent did not exceed this margin.

⁷²⁸ S. Sheldon, 'Gender Equality and Reproductive Decision-Making' 2004 12 *Feminist Legal Studies* 303; Lind, 'Evans v United Kingdom – judgments of Solomon: power, gender and procreation' 2006 18 *Child and Family Law* 579.

⁷²⁹ For the purposes of the current analysis, the Court's findings as to the alleged violation of Article 2 will not be considered as not relevant.

⁷³⁰ *Evans* (Chamber), para 49.

⁷³¹ *Ibid*, para 53.

Once before the Grand Chamber, both parties reiterated their previous claims. In addition, the applicant pointed out that a significant difference existed between the emotional and physical investment of the female party and the male's contribution to the process of IVF (mere sperm donation).⁷³² This factor, in her opinion, should have prevented J. from suddenly abandoning the project, without even providing an explanation for his change of mind.⁷³³ Moreover, she complained of discrimination contrary to Article 14 in conjunction with Article 8. In this regard, she contended that, under HFEA 1990, a woman who could naturally procreate was subject to no control over the embryos developed from the moment of fertilisation, while herself and any other woman conceiving via IVF was subject to the will of the sperm donor.⁷³⁴

The Grand Chamber began by observing that the complexity and intricacy of the case, which derived from the existing tension between two mutually exclusive interests and, therefore, two irreconcilable positions.⁷³⁵ In fact, if the applicant was permitted to use the embryos, J. would have been "forced to become a father".⁷³⁶ Similarly, due to her health conditions, her desire to have her own biological child risked being frustrated by J.'s withdrawal of consent.⁷³⁷ The Court found it important to underline that the applicant was not otherwise prevented from becoming a mother in a social, legal and even physical sense.⁷³⁸ In addition to the two private interests, the Grand Chamber argued that the UK legislation was also meant to serve public interests, such as upholding the principle of the primacy of consent and promoting legal clarity and certainty.⁷³⁹

Once reiterated that the question at stake was whether the consent provisions of the HFEA 1990 struck a fair balance between the conflicting public and private interests concerned, the first step consisted in determining the applicability of the doctrine of the margin of appreciation in the *Evans* case. Firstly, it was held that, when a particularly fundamental aspect of an individual's existence or identity is concerned, the afforded margin will be narrow.⁷⁴⁰ However, this rule allows for exceptions whenever there is no consensus among the Member States of the Council of Europe,

⁷³² *Evans* (Grand Chamber), para 62.

⁷³³ *Ibid.*

⁷³⁴ *Evans* (Grand Chamber), para 93.

⁷³⁵ *Ibid.*, para 73.

⁷³⁶ *Ibid.*

⁷³⁷ *Ibid.*

⁷³⁸ *Ibid.*, para 72.

⁷³⁹ *Ibid.*, para 74.

⁷⁴⁰ *Ibid.*, para 77.

concerning either the importance of the interest at stake or the best means of protection.⁷⁴¹ Another exceptional situation, which calls for a wide margin of appreciation, is when the State is required to strike a balance between conflicting private and public interests or Convention rights.⁷⁴²

Having regard to the present circumstances, therefore, the Grand Chamber concluded that the Respondent State ought to be afforded a wide margin of appreciation in light of the morally and ethically delicate nature of the questions at stake, in conjunction with the lack of a uniform European stance in the context of IVF. In order to substantiate its finding, the Grand Chamber noted that, whilst IVF is regulated by primary and secondary legislation in a number of European States (for example, in Austria, Bulgaria, Croatia, Denmark, France, Germany, Greece, Switzerland, the and the United Kingdom, etc.), others (like Belgium, Finland, Ireland, Malta, Poland, etc.) have left the matter to medical practice and guidelines.⁷⁴³ In addition, even among the former group, national legislation provides for different practices concerning the storage of embryos as well as the time limits for a potential withdrawal of consent. For instance, in Germany and Italy, fertilization represents the point at which both parties become unable to withdraw consent.⁷⁴⁴ Differently, in Denmark, Greece, France, the Netherlands and Switzerland, the parties' consent becomes irrevocable at the time of implantation.⁷⁴⁵ Furthermore, the Grand Chamber insisted on the difficulty in comparing the effects on J. to be forced into fatherhood and the consequences on the applicant of being deprived the opportunity to have her own biological child by referring to a divided jurisprudence in the US and Israel.⁷⁴⁶

Moreover, the Court placed emphasis on the origins of the HFEA – in particular, on the fact that its formulation was preceded and accordingly informed by an in-depth examination of the social, ethical and legal consequences of medical progress in the domains of human fertilization and embryology.⁷⁴⁷ Against the applicant's criticism that the rules on consent could not be

⁷⁴¹ *Ibid.* In this case, the public interests served by the bright-line rule resonate with the principle of the primacy of consent and the promotion of legal clarity and certainty.

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*, para 39.

⁷⁴⁴ *Ibid.*, para 42.

⁷⁴⁵ *Ibid.*, para 41.

⁷⁴⁶ *Ibid.*, para 80. This evidence was provided by the parties. Regarding Israel, the Supreme Court was faced with a case (*Nachmani v Nachmani*) with identical facts as *Evans v UK*. A five-judges panel upheld the man's right not to be forced to become a parent; the Supreme Court in its extended composition (11 judges) reconsidered the case and decided in favour of the woman. However, each judge drafted a separate opinion.

⁷⁴⁷ *Ibid.*, para 86. The Warnock Committee was established in 1982 in response both to the birth of Louise Brown, namely the first baby to be born via IVF, in 1978 and, more generally, to concerns around the speed with which ART were developing. The role of the Committee consisted in creating principles to regulate the employment of IVF and

disapplied under any circumstances, the Grand Chamber held that the absolute character of the national legislation did not breach Article 8 *per se*. Rather, the legislature's decision to enact the contested bright-line was justified by the aim of ensuring a balance between the parties involved in IVF as well as respect for human dignity and free will. Further, the absolute nature of the rule was to be praised for promoting legal certainty, thus avoiding inconsistencies inherent in balancing on a case-by-case basis.⁷⁴⁸

Despite its great sympathy for the applicant's particularly delicate situation, the Court concluded that Natalie Evans' right to respect her desire to become a biological mother should not have been accorded greater weight than J.'s interest not to become a father.⁷⁴⁹ Therefore, given the absence of a European consensus on the matter, the fact that the national rules reached a fair equilibrium between the competing interests and had been brought to the attention of the applicant, the majority of the Grand Chamber (thirteen votes to four) concluded that no violation of Article 8 had occurred.⁷⁵⁰ Concerning the applicant's complaint under Article 14, the Court considered that no separate analysis was needed because the reasons underlying the finding of no violation of Article 8 could also provide for a justification under Article 14.⁷⁵¹

If compared to the previous case-law, the position of J. is certainly peculiar. While in *X, Y and Z v the UK* and in the surrogacy cases, the applicants wished to be recognised as the legal fathers of their children by virtue of their commitment to and involvement in their children's life, in the *Evans* case, J. wishes to resist fatherhood and, accordingly, opposes the use of his genetic material by his former partner for her own purposes. However, a similar idea of what it entails to be a father cuts across all three narratives. J. had explained his withdrawal of consent to prevent a situation where his biological child was not actively raised by himself, together with the child's mother.⁷⁵² His decision was not driven by the legal and financial burdens of fatherhood; he clarified that "his clear position was one of fundamental rather than purely financial objection".⁷⁵³ Therefore, his understanding of fatherhood fits perfectly within the model of 'new fatherhood': he refuses the limited view of fatherhood as a legal status accompanied by financial responsibilities

embryology. The findings of the Committee resulted in the so-called Warnock Report (1984), which inspired the Human Fertilisation and Embryology Act.

⁷⁴⁸ *Ibid.*, para 89.

⁷⁴⁹ *Ibid.*, para 90.

⁷⁵⁰ *Ibid.*, para 92.

⁷⁵¹ *Ibid.*, para 95.

⁷⁵² *Evans v Amicus Healthcare Ltd and Others* [2004], paras 32 and 89.

⁷⁵³ *Ibid.*, para 32.

and describes fatherhood as a more hands-on and responsible role.⁷⁵⁴

More importantly, by stating that the implantation of the embryos in the applicant's uterus would have necessarily forced J. to become a father, the Court seems to fail to understand the variety of subtleties and nuances enclosed in the concept of fatherhood and might have missed a great opportunity to realise the ongoing fragmentation of fatherhood and to reconsider what being a father requires and entails. Arguably, the above statement might simply mean that, according to the Court, fatherhood – whether it means care or provision – must be freely chosen. An alternative reading, however, might reveal the Court's sharing of the same concern of J. and, consequently, its efforts to promote the indivisibility of fatherhood.

Although not explicitly recognised by the Court, it is widely agreed that pregnancy has different implications for men and women.⁷⁵⁵ Men can choose to walk away from it and undertake no more than the minimum responsibilities established by law – such as, financial provision.⁷⁵⁶ Apart from deciding the extent of their involvement following the sexual intercourse, the possibility for fathers to have an 'opt-in/opt-out' relationship with their children remains throughout this period.⁷⁵⁷ Differently, women are forced to bear greater responsibilities as a result of pregnancy. Walking away entails legal and psychological challenges; and, later, they undertake a disproportionate share of child rearing.⁷⁵⁸

IVF creates a lapse of time between conception and pregnancy. In the case of *Evans*, it is clear that this specific timeframe enabled J. to exercise a level of control over his procreation, which he would not have enjoyed in case of natural reproduction. During the period where the embryo is temporarily placed outside the woman's body, it seems possible to allow the male gamete provider to have a say on the future of the embryo without interfering with the woman's physical integrity.⁷⁵⁹ The Court seems to embrace this very approach. Until when allowed by ART, the Court takes the chance to promote gender equality in the sphere of reproductive decision-making by conceptualising fatherhood as a unitary status ('all or nothing'), thus bringing the position of J. closer to the indivisibility of motherhood. The emerging definition of fatherhood

⁷⁵⁴ R. Collier and S. Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart, 2008), 97.

⁷⁵⁵ *Ibid.*, 96; Lind, 'Evans v UK', 589.

⁷⁵⁶ *Ibid.*

⁷⁵⁷ C. Smart, 'Preface' in R. Collier and S. Sheldon (eds.), *Fathers' Rights Activism and Law Reform in Comparative Perspective* (Hart, 2006), xi.

⁷⁵⁸ Lind, 'Evans v UK', 589.

⁷⁵⁹ S. Harris-Short, 'Evans v Amicus Healthcare Ltd – Judgment' (para 35) in R. Hunter, C. McGlynn and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (Hart, 2010), 73.

would therefore be an all-encompassing one, which adds nurture to the conventional feature of biology, heterosexuality and the existence of a stable relationship (if not marriage) between the biological parents. No intermediate forms of fatherhood seem to be conceivable in the Court's mind.

However, treating the parties as entirely alike amounted to denying the gendered reality of their lives.⁷⁶⁰ In the context of infertility treatments and, more generally, in the procreation domain, men and women are not easily comparable.⁷⁶¹ In the present case, the statute did not openly discriminate between men and women; however, its consequences on men and women were *de facto* different. This explains why the best way for the applicant to challenge the UK legislation was possibly to insist on the discriminatory dimension of her situation and, more specifically, argue that she was discriminated against on the basis of her sex.⁷⁶² If J. had testicular cancer, he would not have faced the same challenges posed by ovarian cancer to Ms Evans.⁷⁶³ He could have simply stored his sperm through a fairly safe and uncomplicated procedure, with no need to create and store embryos.⁷⁶⁴ At the time Ms Evans received treatment, the state of medical science made it easier for sperms to be stored and successfully used later, than it was for egg cells.⁷⁶⁵ Indeed, no successful pregnancy had ever resulted from stored eggs; therefore, embryo storage represented Ms Evans' only viable option.⁷⁶⁶ On this basis, it would have been relatively easy for the Court to conclude that the UK legislation violated Article 14.⁷⁶⁷ However, the Court refused to confront the discriminatory dimension of the case.

The Court, however, seems to believe that compelling J. to father a child against his will is equivalent to compelling Evans to carry one against hers.⁷⁶⁸ Accordingly, the fact that J. cannot force Evans to undergo invasive and undesired ART treatment and carry an unwanted pregnancy to create a child for him to raise was perceived directly comparable to the fact that Evans could not insist on using the embryos and creating a genetic child of J. against his own will.⁷⁶⁹ A similar

⁷⁶⁰ *Ibid.*, 74.

⁷⁶¹ Sheldon, 'Gender Equality and Reproductive Decision-Making', 303.

⁷⁶² Lind, 'Evans v UK', 587.

⁷⁶³ S. Sheldon, 'Commentary on Evans v Amicus Healthcare Ltd' in R. Hunter, C. McGlynn and E. Rackley (eds.), *Feminist Judgments: From Theory to Practice* (Hart, 2010), 62.

⁷⁶⁴ *Ibid.*

⁷⁶⁵ *Ibid.*

⁷⁶⁶ *Ibid.*

⁷⁶⁷ Lind, 'Evans v UK', 587.

⁷⁶⁸ Sheldon, 'Commentary on Evans', 62.

⁷⁶⁹ *Ibid.*

policy of formal equality entails what Collier and Sheldon calls the risk of geneticisation: it focuses exclusively on genetic links, thus treating men's and women's contributions to a child as equal, at the expense of any consideration for gestation.⁷⁷⁰ A similar argument was brought forward by the dissenting judges, according to whom the circumstances of the case required to "look beyond the mere question of consent in a contractual sense".⁷⁷¹ In their joint opinion, the values and issues called into question by the particular situation of Ms Evans weighed heavily against the contractual approach adopted by the majority.⁷⁷²

Along the same lines, the dissenting judges criticised the majority's use of the doctrine of the margin of appreciation as a "merely pragmatic substitute for a thought-out approach to the problem of proper scope of review".⁷⁷³ In so doing, the majority abstained from exercising its supervisory role and the doctrine of the margin of appreciation was eventually accorded normative force in striking a fair balance between the interests and rights involved. With particular regard to this issue, rather than undertaking its own review, the Court does no more than underline the comprehensive nature of the debates preceding the entering into force of HFEA 1990 and restates the legitimate considerations which informed the formulation of the rules on consent. On the positive side, however, the assessment of a European consent was taken seriously. The Court demonstrated the absence of a uniform approach to the issue of IVF by developing a comparative analysis that effectively documented the variety of ways through which IVF was dealt with within the Member States of the Council of Europe and beyond.⁷⁷⁴

Another concern underlying the dismissal of Evans' application might reflect the Court's attachment to the bi-parental family model and, therefore, to an understanding of fatherhood that is derivative from his relationship with the child's mother. In other words, the Court seems to

⁷⁷⁰ Collier and Sheldon, 'Fragmenting Fatherhood', 226. Further evidence of the Court's "obsession with genetic progeny" (Lind, 'Evans v UK', 584) can be inferred from the great deal of sympathy expressed by the Court for the applicant's claims. As suggested by Lind, the Court's acknowledgment of the cruelty of Ms Evans' fate might reveal the Court's support for a collectively understood appropriateness of the wish of all aspiring parents to have their own biological children and, in this case, of the desire of Ms Evans for the ideal of motherhood. See Lind, 'Evans v UK', 586.

⁷⁷¹ *Evans* (Grand Chamber), Joint Dissenting Opinion of Judges Turmen, Tsatsa-Nikolovska, Spielmann and Ziemele, para 10.

⁷⁷² *Ibid.*

⁷⁷³ *Ibid.*

⁷⁷⁴ As sources relied on, the Court cites two studies undertaken by the Council of Europe: 'Medically Assisted Reproduction and the Protection of the Human Embryo – Comparative Study on the Solution in 39 States' (Council of Europe, 1998); the replies by the Member States of the Council of Europe to the Steering Committee on Bioethics 'Questionnaire on Access to Medically Assisted Reproduction' (Council of Europe, 2005).

favour marital fatherhood, broadly interpreted as fatherhood that depends on existing marital or similar ties between father and mother. Arguably, the dissolved relationship between Evans and J. was interpreted as further discouraging the continuation of a parental project, which, at least in the eyes of the Court, appeared incomplete as involving a poor version of fatherhood. The Court's privileging of marital fatherhood is also confirmed by its judgment in *Dickson v UK* (which was decided in the same year as *Evans*), where the existence of a marital tie between the applicants proved decisive in finding the refusal to grant access to artificial insemination (AI) techniques to a serving prisoner in breach of the applicants' right to respect for private life.⁷⁷⁵

The first applicant, Mr Dickson, was convicted of murder and sentenced to life imprisonment. The second applicant, Mrs Dickson, met her husband while she was also imprisoned. Subsequently, she was released and they married in 2001. Since the applicants desired to have a child, they applied for facilities for AI. Considering Mr Dickson's earliest expected release date (scheduled for 2009) and Mrs Dickson's age, the couple were unlikely to be able to have a child together without the employment of AI arrangements. Nonetheless, their application was eventually refused by the Secretary of State on the ground that, in accordance with the general policy, requests for artificial insemination by prisoners could only be granted in "exceptional circumstances".

Having exhausted all domestic remedies, the couple lodged an application with the Strasbourg Court arguing that the refusal of AI facilities breached their right to respect for private and family life guaranteed by Article 8 as well as their right to found a family under Article 12 of the Convention. In response, the Government based the justifiability of the contested policy on three distinct principles: losing the opportunity to beget children was an inevitable and necessary consequence of imprisonment; public confidence in the penal system would be compromised if the punitive and deterrent elements of a sentence were circumvented by allowing prisoners convicted of serious offences to conceive children; and the inevitable absence of one parent for a long period would have negative implications on the child and, consequently, on society as a whole.

The Chamber held that, given the wide margin of appreciation enjoyed by the State on this matter, the decision to refuse facilities for AI had not failed to strike a fair balance between the

⁷⁷⁵ *Dickson v the United Kingdom*, Application No. 44362/04, 18 April 2006 (Chamber); 4 December 2007 (Grand Chamber).

interests involved, thus not breaching Article 8. This judgment was subsequently referred to the Grand Chamber for consideration, which attentively examined the three justifications advanced by the Government to support the policy's consistency with the Convention. In relation to the first, it was held that the inability to procreate was not an inescapable consequence of imprisonment.⁷⁷⁶ Secondly, there is no place under the Convention framework for the automatic forfeiture of rights by prisoners based merely on what might offend public opinion.⁷⁷⁷ Thirdly, the State's positive obligations to guarantee the effective protection of children cannot go so far as to prevent a couple from attempting to conceive a child, particularly in circumstances similar to those of the present case.⁷⁷⁸ In fact, the second applicant was capable of taking care of the child until the husband was released.

Regarding the margin of appreciation enjoyed by the State, the Grand Chamber observed that, although more than half of the Contracting States provides for conjugal visits, the Court has not yet interpreted the Convention as requiring States to do so. Therefore, in line with the Chamber, it argued that this represents an area where States enjoy a wide margin of appreciation in determining the means to ensure compliance, having regards to the needs of the individuals and of the community. However, the Court also argued that any real balancing exercise between the competing individual and public interests was excluded by the peculiar structure of the contested policy. More specifically, it was noted that the policy placed an extraordinarily high 'exceptionality' burden on the applicants: they were required to prove that the refusal of access to AI would have prevented conception altogether as well as that their position was 'exceptional' within the meaning of the criteria of the policy.⁷⁷⁹ The high threshold that was consequently set by the policy ultimately precluded the assessment of the proportionality of the interference with the rights of the applicant, as required by the Convention.⁷⁸⁰ Given the fundamental importance of the matter for the applicants, the Grand Chamber concluded that the Respondent State had overstepped its margin of appreciation, since no fair balance between the conflicting interests had been struck.⁷⁸¹ Accordingly, a violation of Article 8 of the Convention was found.

⁷⁷⁶ *Dickson* (Grand Chamber), para 74.

⁷⁷⁷ *Ibid.*, para 75.

⁷⁷⁸ *Ibid.*, para 76.

⁷⁷⁹ *Ibid.*, para 82.

⁷⁸⁰ *Ibid.*

⁷⁸¹ *Ibid.*, para 85.

As argued by Burbergs, the judgment in *Dickson* further expanded the scope of Article 8 by building on its previous judgment in *Evans*. More specifically, the right to respect the decision to become or not become a parent, established in the *Evans* case, developed into the right to choose to become a parent in the case of *Dickson*.⁷⁸² A great deal of trust was accorded to the mere intention of Mr Dickson to become a parent, regardless of his strictly personal circumstances. Two interrelated considerations – both displaying the Court’s adherence to marital fatherhood – possibly underlie the Court’s conclusion: firstly, it must be noted that Mr Dickson and Mrs Dickson were married and their marital union might have conferred an extra layer of trust regarding his intention; secondly, the inconsistency of his inability to immediately act as a carer with the best interests of the child was considered capable of attenuation by virtue of the second applicant’s potential involvement since the very moment of birth. Accordingly, the Grand Chamber notes that Mrs Dickson is at liberty and therefore able to take care of the child, in anticipation of the husband’s release.⁷⁸³

Different from the *Evans* case, biology is conceived as something that can exist separate from care. At least in the short-term, neither Mr Dickson nor the Grand Chamber seem to be inspired by the ideal of ‘new fatherhood’, thus conceiving fatherhood as a mere legal status grounded on a biological link and accompanied by financial burdens. It would almost seem that the recognition of Mr Dickson’s right to become a parent stems from the symbolic value of fathers in completing the nuclear family, rather than from the more concrete need to provide the child with a social father.⁷⁸⁴ Daily contact is not deemed necessary and indispensable for the exercise of a meaningful paternal role – at least, temporarily.⁷⁸⁵

What is clear is that, at least for short-term purposes, the Court approves a traditional division of labour, which does not require the biological father to be present as a caretaker. Therefore, biological fatherhood – most likely, thanks to the coexistence of marital fatherhood – seems sufficient to get a parental project started. Had Mrs Dickson been the one longer in prison,

⁷⁸² Burbergs, ‘Article 8 as a Nursery for New Rights’, 326.

⁷⁸³ *Dickson* (Grand Chamber), para 76.

⁷⁸⁴ Sheldon, ‘The Regulation of Reproductive Technologies’, 526.

⁷⁸⁵ It is suggested that allowing a prisoner to found a family through AI could produce overall beneficial results. The wellbeing of the resulting child could be safeguarded through a series of recently introduced programmes directed to enhance contact between imprisoned fathers and their children. Furthermore, becoming a father could play a rehabilitative function in the inmate’s life and facilitate his future reintegration within society. See H. Codd, ‘Regulating reproduction: prisoners’ families, artificial insemination and human rights’ (2006) *European Human Rights Law Review* 47; E. Sutherland, ‘Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: is Child Welfare becoming the New Eugenics?’ 2003 82 *Oregon Law Review* 1003.

it remains to be ascertained whether a violation of Article 8 would be found and, if so, whether her reproductive contribution *per se* (provision of gametes followed by pregnancy and delivery) without the possibility to provide care would have been sufficient to make Mrs Dickson a legal mother.

Moreover, despite her potentially crucial role for the child's early development, the reasoning of the Court remained mainly concerned with the position of Mr Dickson and the welfare of the conceived child. The fact that AI techniques were likely to represent the last chance for Mrs Dickson to reproduce was acknowledged only *en passant* and, more generally, her Convention rights were not considered separately from those of her husband in the balancing exercise.⁷⁸⁶ Possibly, in the Court's opinion, interference with her rights was partially justified by the seriousness of her husband's crime as if she was guilty by association.⁷⁸⁷

Finally, it is interesting to draw a link between the opposite outcomes reached by the Chamber and Grand Chamber, respectively, and the application of the doctrine of the margin of appreciation. Both panels of judges agreed on the need to award a wide margin of appreciation in light of the lack of European consensus on the issue whether prisoners should be allowed access to AI. What made the ultimate difference, therefore, were the implications of the doctrine on the standard of review. Having regard to the Chamber's reasoning, the Court did no more than report on the careful consideration given to the particular circumstances of the applicants by the Secretary of State and the national courts, thus abstaining from its supervisory task.⁷⁸⁸ The employment of the doctrine of the margin of appreciation therefore resulted in a total deference to national perceptions and standards. Differently, although it forgot to consider the interests of the second applicant separately, the Grand Chamber assessed itself on whether a fair balance between competing private and public interests had been struck.⁷⁸⁹ Clearly, in this instance, the undertaking of a human rights review by the Court itself – as opposed to deference to national authorities – played a decisive role in finding a violation of Article 8.

⁷⁸⁶ E. Jackson, 'Case Commentary – Prisoners, their partners and the right to family life' 2007 19(2) *Child and Family Law Quarterly*, 244. A similar concern was raised by the dissenting opinion of Judge Borrego Borrego in the Chamber's judgment.

⁷⁸⁷ H. Codd, 'Policing Procreation: Prisoners, Artificial Insemination and the Law' 2006 2 *Genomics and Society* 110.

⁷⁸⁸ *Dickson* (Chamber), para 38.

⁷⁸⁹ *Dickson* (Grand Chamber), paras 82-84.

3. Concluding Remarks: What Persists and What is Abandoned

This concluding section will attempt to provide an answer to all the sub-questions that this thesis aims to address, as enumerated in the previous chapter (on page 80). Firstly, in light of the above jurisprudential analysis, it seems possible to conclude that the definition of fatherhood endorsed by the Court remains largely informed by the conventional paradigm, described in Chapter 1. Concerning the first set of cases – namely, those arising from post-birth claims – the Court has downplayed the importance of a biological link in making someone a legal father, which it reiterated as recently as in January 2015, on the occasion of the case of *Paradiso and Campanelli v Italy* (which, as anticipated, is not a final judgment).

Prior to this, in the case of *X, Y and Z*, the Court had ruled out the precedent set down in *Marckx* on the basis that Z was not X's biological child, as a result of the latter's transsexuality. By virtue of this element, coupled with the absence of a European consensus, Article 8 did not trigger the positive obligation to ensure Z's integration in his family through the legal recognition of the tie between X and Z. Hence, although not relevant to the finding of family life among the applicants, biology was reinserted as necessary to achieve legal fatherhood. Similarly, in the cases of *Mennesson* and *Labassee*, it was precisely the biological link existing between the intended father and the twins born as a result of surrogacy in the US that led to a violation of the children's right to respect for family life under Article 8. Therefore, it is only in the case of *Paradiso and Campanelli* that the Chamber disentangles a father's right to respect for his family life from the nature of his tie with a surrogacy-born child. In this case, the Court's deviation from a biological understanding of fatherhood occurred in the name of the best interests of the child, which were interpreted as allowing the child to continue living with his intended parents with whom he enjoyed *de facto* family life, regardless of whether their social ties is backed up by biological relatedness or not.⁷⁹⁰

The same departure cannot be observed in the second set of cases. The judgment in *Evans* is emblematic of the Court's refusal to accept the reality of fragmented fatherhood. By supporting the English court's decision to oppose the use of stored eggs by Evans following J.'s withdrawal of consent, the Court eventually conceptualises fatherhood as a status that is not susceptible to

⁷⁹⁰ It might be useful to recall that the Court stated that the State is under the "obligation to take the child's best interests into account, regardless of the nature of the parental relationship, genetic or otherwise" (translation by the author from French, para 80).

disaggregation and that, in addition to biology, requires other circumstances, such as the provision of care within a dual parental family (aversion towards multi-parenthood). Similarly, in the case of *Dickson*, the biological contribution of a serving prisoner – coupled with his intention to become a father and his marital union with the prospective mother of the child – was taken as sufficient to get a parental project started. In other words, since Mr Dickson could contribute to conception by merely providing his sperm, refusing access to AI techniques amounted to depriving him of his right to become a parent through ART, as derived from Article 8.

Despite the different approach to biology, all judgments under analysis seem to express a preference for the bi-parental family model – intended as the presence of two carers – and, accordingly, to support a marital or pseudo-marital understanding of fatherhood; in other words, the Court tends to construct fatherhood as a corollary of his relationship with the child's mother. This preference for a derivative conception of fatherhood explains why the Court reached two opposite outcomes in the cases of *Evans* and *Dickson*. Whilst the divergence of future plans between the two potential biological parents – Ms Evans and J. – ruled out the possibility for the child to be raised by a two-parent family, the promising family package in the case of *Dickson* seems to have contributed to the recognition of the right to become parents to Mr Dickson and Mrs Dickson.

Different from *Evans*, where the potential biological father was no longer in a relationship with Ms Evans, Mr and Mrs Dickson enjoyed a formalised relationship accompanied by serious intentions to create a family together. In the case of *Dickson*, therefore, it is not necessarily true that biology *per se* was held sufficient to entail legal fatherhood; more likely, the promising family package and, more substantially, the marital relationship existing between the applicants enabled Mr Dickson to reach the threshold of legal fatherhood. The same attachment to a marital conception of fatherhood emerges also in the case of *X, Y and Z*, where the legal impossibility for X and Y to marry due to the former's gender identity seems to have played a role in leading to the finding of non-violation of Article 8.

Concerning the other two conventional features, while the relevance of breadwinning is not discussed in any of the analysed judgments, the Court's attachment to a heteronormative conception of fatherhood is at the core of its decision in *X, Y and Z*. As explicitly acknowledged by the Court, the positive obligation to provide legal recognition to existing parent-child ties – established in *Marckx* and subsequent case-law – could not be held applicable to the present case,

as Z was not related, in the biological sense, to X, because of his transsexualism. Given the significant weight attached to the gender identity of the aspiring father, it seems possible to identify the enduring resistance of a heteronormative view of fatherhood, which presupposes alignment of biological sex, sexuality and gender identity.

In addition to restating the relevance of biology (with the exception of the decision in *Paradiso and Campanelli*), heteronormativity and marriage, the Court adopts an increasingly broad definition of the notion of family life that, although grounded on the existence of close personal ties between the parents and their children, does not seem to require – at least in the case of *Paradiso and Campanelli* – more than six months of cohabitation. The establishment of family life being a requisite for discussing whether the applicant has a right to be legally recognised as the legal father of the child under Article 8, these judgments seem to indicate that legal fatherhood requires also the existence of close personal ties and, consequently, care. It appears, therefore, that the Court has become fond of the model of ‘new fatherhood’, whose new characteristic is a greater involvement in care in addition to traditional paternal roles. Therefore, ‘new fatherhood’, as perceived by the Court, does not necessarily imply a departure from the conventional paradigm. Rather, it is more likely to add new features to the traditional father figure. In this specific domain, this process resulted in no discount being made in relation to the requirement of biology (with the exception of *Paradiso and Campanelli*), marriage and heterosexuality, which seem to remain decisive for determining legal fatherhood.

Apart from grounding their complaints in Article 8, in the cases of *X, Y and Z* and *Evans*, the applicants also brought a discrimination claim to the attention of the Court. In the case of *X, Y and Z*, the applicants argued that had X been born a man, he could have been registered as Z’s legal father, in accordance with the law at the material time (HFEA 1990).⁷⁹¹ Similarly, Ms Evans complained a violation of Article 14 in conjunction with Article 8 on the ground that, while a woman who was able to conceive without medical assistance was not subject to any control concerning the development of the embryos after fertilisation, a woman who could conceive only via IVF was subject to the will of the sperm donor.⁷⁹² However, the Court did not take the discriminatory dimension of these cases seriously. Indeed, in both cases, the Court held that there was no need to consider the complaint under Article 14, as the reasons supporting the finding of

⁷⁹¹ *X, Y and Z*, para 54.

⁷⁹² *Evans* (GC), para 93.

non-violation of Article 8 could be used to address the other complaint as well. As a result, no trace of an anti-stereotyping approach can be found within the Court's jurisprudence pertaining to ART.

Moving onto the interpretative tools employed, ART is an area where, given the delicate moral, ethical and social issues triggered by the employment of these techniques, coupled with the lack of a common European approach, the Court has proved quite generous in granting a wide margin of appreciation to the Contracting States. As previously observed, in the case of *Paradiso and Campanelli*, the Court did not focus on the issue of surrogacy, but on the removal of the child and his placement under guardianship. Still, the Court was of the opinion that national authorities enjoyed a wide margin of appreciation in the field of adoption or when the need for placing a child in public care had to be evaluated.⁷⁹³

As to the implications of the use of this doctrine, two main and interrelated points can be made. Firstly, the lack of a European consensus is used to justify differential treatment with respect to positive obligations.⁷⁹⁴ In the cases of *X, Y and Z*, *Mennesson* and *Labassee*, it seems that the Court did not feel prepared to extend the application of the positive obligations to provide legal recognition to *de facto* family ties and protect their integrity in the cases under scrutiny, especially in light of the absence of a consensus across Contracting States on issues related to transsexuality and surrogacy. Hence, the positive obligations doctrine does not seem to amount to a sufficiently convincing argument to triumph the absence of a European shared approach. Although this stance tends to be the reasoning offered for the conclusion of a non-violation, it appears that the extent to which positive obligations are deemed applicable varies also in accordance with the degree of adherence of the family to the conventional model.⁷⁹⁵ This is succinctly illustrated by the judgment in *X, Y and Z*, where the family life at issue involved a female-to-male transsexual, his female partner and her biological child conceived through sperm donation.

Secondly, and possibly obviously, the finding of a violation depends on the standard of review undertaken by the Court – in other words, how strict is the Court's assessment under Article 8(2). When the resort to the doctrine of the margin of appreciation has not lowered the standard of review, as it has been observed with respect to the judgments in *Paradiso and Campanelli*, *Dickson*

⁷⁹³ *Paradiso and Campanelli v Italy*, para 74.

⁷⁹⁴ C. O'Mahony, 'Irreconcilable Differences? Article 8 ECHR and Irish Law on Non-traditional Families' 2012 26(1) *International Journal of Law, Policy and the Family*, 56.

⁷⁹⁵ Kilkelly, 'Protecting CRs under the ECHR', 253.

and *Mennesson* concerning the children's right to respect for private life,⁷⁹⁶ the Court has found a violation. Differently, when granting a wide margin of appreciation resulted in total deference, like in the case of *Evans*, the Court concluded that no violation had occurred. A third group of cases, however, can be detected among this jurisprudence: it includes those cases where the Court's reliance on the doctrine has lowered the standard of review but without leading to deference. This *modus operandi* of the doctrine can be observed in the case of *X, Y and Z* as well as in the judgments of *Mennesson* and *Labassee* regarding the applicants' right to respect for family life. In these cases, the Court has done no more than emphasise how the disadvantages suffered by the applicants could be practically overcome, rather than effectively balance the disadvantages against the competing public interests. Just like in *Evans*, in the case of *X, Y and Z* and, partially, in the French surrogacy cases, the Court's failure to undertake a proper proportionality analysis has led to a finding of non-violation.

Despite being able to draw links between the effect of the doctrine of the margin of appreciation and the final judgment, it does not seem possible to identify similar connections between the *modus operandi* of the doctrine and the Court's degree of departure from a conventional understanding of fatherhood. Arguably, one could expect that the lower the standard of review, the more respectful the Court is towards national choices which, therefore, leaves less room for updating and reconsidering the traditional paradigm of fatherhood. However, this does not appear true if due regard is given to the judgment in *Dickson*. In this case, although it has been noted that the reliance on the doctrine of the margin of appreciation had no impact on the standard of review, the finding of a violation of Article 8 signified a reinforcement of biology and marriage as crucial factors of legal fatherhood.

However, the Court's departure from a biological understanding of fatherhood in the case of *Paradiso and Campanelli* seems to have been facilitated by employing an implicit interpretation of Article 8 that in light of present-day conditions. Indeed, although the judgment did not directly concern the issue of surrogacy, the Court seems to be aware of the fact that scientific and medical progress creates the inescapable need for updating the notion of 'family life' and expanding the scope of Article 8 to reflect contemporary family realities, thus preserving the effectiveness of

⁷⁹⁶ In this case and with respect to the children's right to respect for private life, the stricter standard of review was also due to the fact that when an essential aspect of the identity of individuals is at stake, the margin granted to States is narrower. See *Mennesson*, para 84.

rights. In the case of *Paradiso and Campanelli*, the interpretation of Article 8 in light of present-day conditions is realised through a reading of the best interests of the child that is dictated by his/her concrete social ties, rather than by a biological understanding of filiation and, therefore, of parenthood.

This brings us to discuss to what extent the Court has taken all parties affected into consideration. Overall, the Court appears unwilling to recognise a potential conflict of interests between the parties, except in extreme cases, like in *Evans*. In this case, the position of the applicant is definitely discussed, but only through the limited lens of formal equality. Having regard to the rest of the case-law, the child and the mother have not been systematically granted due regard. In all cases, apart from *Evans*, the implications of the contested decision on the (potential) mother's rights and interests are not given separate treatment; rather the mother's claims are considered only in as much as her position aligns with that of the father. This explains why, in the cases of *X, Y and Z*, *Dickson* and *Paradiso and Campanelli*, the final outcome favours or compromises the mother's and the father's interests in equal measure, while in the cases of *Mennesson* and *Labassee*, the claims of the father are provided with a positive answer, while those of the mother are left out in the cold. Indeed, by identifying the existence of a biological link as decisive to find a violation of the children's right to respect for private life, the Court automatically excludes any legal relevance of the social ties existing between the mother and the child.

The interests of the child, or children, involved were considered in a more systematic but not necessarily proper way. In the case of *X, Y and Z* as well as in the surrogacy case-law, the Court approached the issue of whether the legal recognition of the father/parent-child relationship would make a difference for the child. However, this step did not always lead to a correct consideration of the best interests of the child. As previously highlighted, in the case of *X, Y and Z*, the Court stressed how the obstacles encountered by the child (as well as by the parental couple) could have been circumvented, rather than acknowledging – in line with its previous jurisprudence – that providing a social tie with legal recognition serves the best interests of the child. Similarly, in the cases of *Mennesson* and *Labassee*, the children's right to have their ties with their social parents legally recognised was considered worthy of protection under Article 8 but only with respect to biological parentage.

Finally, in both *Evans* and *Dickson* (Grand Chamber), although not explicitly mentioned, the best interests of the resulting child were constructed as contingent on the (sooner or later)

existence of a stable family unit made of a mother and a father. Overall, with the exception of *Paradiso and Campanelli*, the interpretation of the principle of the best interests of the child seems to have primarily reflected a conventional ideology of the family and, consequently, of fatherhood: the existence of a biological link with the father, the latter's compliance with heteronormative standards and a marital or pseudo-marital relationship with the child's mother (to the detriment of father-child social ties) emerge as indispensable ingredients for an effective realisation of the child's best interests.

To conclude, what comes to light quite clearly is the persistence of biology, heteronormativity and marriage as necessary factors for allocating legal fatherhood. To what extent is this approach to fatherhood mirrored in national legal systems? Having regard to surrogacy, all three domestic approaches outlined in Section 1 (on Germany, France and the UK) seem to condition the conferral of legal parenthood on the existence of a genetic link between one of the intended parents – who is generally the father – and the child and, although not always explicitly, on the relationship between the intended parents as a couple.⁷⁹⁷ As such, national responses fit perfectly within the Court's endorsement of a biological definition of fatherhood before its decision in *Paradiso and Campanelli*. Indeed, it must be recalled that, it is only in its latest judgment that the Court declared genetic relatedness irrelevant when assessing the best interests of the child. Had the judgment been primarily concerned with the issue of surrogacy, the Court could have been legitimately considered the forerunner of a gradual departure from a biological understanding of fatherhood. However, given that the object of analysis was the child's removal and his placement under guardianship, the degree of novelty and progress brought about by the Court is debatable.

Concerning the relevance of marriage or marriage-like relationships, the UK and the German approaches seem to be in line with the Court's endorsement of a derivative conception of fatherhood. In these two national systems, the construction of fatherhood as a corollary of his relationship with the child's mother emerges from the rules pertaining to the attribution of legal parenthood following ART. Moreover, in all three countries considered, a certain attachment to a marital or pseudo-marital conception of fatherhood can be inferred also from the impossibility for single persons and, more specifically, men to access these services. Surrogacy, which represents

⁷⁹⁷ It is no coincidence that the Court's decision in the case of *Mennesson v France* was referred to by the German Federal Court of Justice in its ruling of December 2014.

the only means of having a child for a single man, is prohibited under French and German laws, while it is limited to couples under the HFEA 2008.

Overall, with the controversial exception of the judgment in *Paradiso and Campanelli*, the Court has shown a certain unwillingness to take up an activist role and, as such, to use the law as a tool for pushing for or imposing legal change at the national level. Rather, the Court's wide resort to the doctrine of the margin of appreciation, together with its reluctance to analyse the discrimination claims brought in the cases of *X, Y and Z* and *Evans* and the strong alignment between the Court's jurisprudence and the national legal systems are indicative of the Court's attempt to respect national choices and, therefore, of its understanding of the role of the law as more reflective, than transformative, of the legal realities across Contracting States.

CHAPTER 3 – The End of the Marital Family: What Matters Then?

Introduction

This chapter attempts to investigate to what degree the Court deviates or adheres to the conventional definition of fatherhood, in the specific domain of post-separation/divorce family life. Just like the previous chapter, it will be divided into three main parts. Section 1 considers national reactions to an increased decline of marriage as a choice or as a lifelong commitment. In the face of such sociological change, this section will outline what has replaced marriage, which has traditionally been a *trait d'union* between fathers and their children, or whether/how marriage has simply been revisited in national legal systems. Section 2 critically analyses a limited number of ECtHR cases arising out of requests of unmarried and divorced fathers seeking greater involvement in the lives of their biological children through the award of contact or residence rights. The relevant jurisprudence will be split into two sub-sections, one considering cases brought by unmarried fathers and the other exploring the Court's attitude towards applications lodged by divorced fathers. The analysis of this case-law will bring to the fore the definition of fatherhood endorsed by the Court and, more specifically, it will seek to identify what conventional features are retained, abandoned or adjusted. Moreover, to make the analysis easier to follow, each sub-section will end with concluding remarks anticipating the most visible jurisprudential trends *vis-à-vis* the sub-questions addressed by the present thesis. Finally, Section 3 will focus primarily on the direct comparison between the approach adopted by the Court with respect to unmarried fathers' and divorced fathers' claims, concerning the elements deemed relevant to find a violation of Article 8.

1. Marriage in Crisis – New/Old Ways of Linking Fathers to Children at the National Level

In recent times, a striking rise in the rate of extra-marital births and the failure of marriage as a long-term commitment to one partner have served to fragment genetic families across households,

with children living apart from at least one of their biological parents.⁷⁹⁸ Despite some increase in the numbers of non-resident mothers, parental separation and divorce tend to result in a progressive alienation of fathers from their children's lives.⁷⁹⁹ The prevalence across Europe of single-mother families represents an unequivocal sign that fathers, after relationship breakdown, typically cease to reside with their children and, consequently, find themselves parenting at a distance, or not at all.⁸⁰⁰ Men who preserve parental roles and responsibilities will also possibly share the father role with the new partner of the child's mother and, should they re-partner too, they will probably cohabit with and parent the children of their new partner.⁸⁰¹

Fathers' behavioural patterns are affected by the high rate of relationship breakdown.⁸⁰² Due to the fact that children are more likely to live with their mothers, fathers tend to parent according to a serial pattern.⁸⁰³ In other words, fathering reflects the serial character of men's adult pairing.⁸⁰⁴ On the other hand, mothering is more likely to follow a linear pattern.⁸⁰⁵ This means that mothers generally continue to live with and nurture their biological children and sometimes they also parent the children of their partner.⁸⁰⁶ By contrast, male parenting is strongly correlated to their relationship with their partner as well as whether they live with their partner.⁸⁰⁷ Fathers parent by household and, therefore, they are more likely to nurture the children they live with.⁸⁰⁸ Instances where fathers engage in multiple and simultaneous nurturing relationships are rare, although increasing.⁸⁰⁹

⁷⁹⁸ R. Collier and S. Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart, 2008), 234. See also C. Smart and B. Neale, *Family Fragments?* (Polity Press, 1999); B. Almond, *The Fragmenting Family* (Oxford University Press, 2006).

⁷⁹⁹ S. Kiehlty, 'Mothers are non-resident parents too', 1-16. Sweden stands out as an exception, experiencing a rise in joint residential custody and fewer and fewer fathers lose contact with their children. On this, see Hobson and Morgan, 'Introduction', 4. Bradshaw et al. demonstrated a similar pattern in Britain: according to their 1999 study, only 3% of divorced fathers had no contact with their children, while 45% of them met their children at least once a week. See J. Bradshaw, C. Stimson, C. Skinner and J. Williams, *Absent Fathers?* (Routledge, 1999), chapter 6.

⁸⁰⁰ Simpson et al., 'Fathers after Divorce', 201.

⁸⁰¹ Collier and Sheldon, 'Fragmenting Fatherhood' 4.

⁸⁰² Dowd, 'The Man Question', 107.

⁸⁰³ *Ibid.*; Dowd, 'Redefining Fatherhood', 26.

⁸⁰⁴ Dowd, 'Redefining Fatherhood', 29.

⁸⁰⁵ *Ibid.*

⁸⁰⁶ *Ibid.*

⁸⁰⁷ *Ibid.*, 24.

⁸⁰⁸ *Ibid.*, 108.

⁸⁰⁹ *Ibid.*, 26. F. Furstenberg and K. Harris, 'When Fathers Matter/Why Fathers Matter: The Impact of Paternal Involvement on the Offspring of Adolescent Mothers' in D. Rhode (ed.), *The Politics of Pregnancy: Adolescent Sexuality and Public Policy* (Yale University Press, 1993), 217.

Men's serial parenting is a clear illustration that fatherhood is seldom "practiced in isolation".⁸¹⁰ On the contrary, the father-child relationship has been strongly mediated by men's relationships with women.⁸¹¹ In other words, fatherhood has been traditionally perceived as part of a "package deal",⁸¹² in which the father-child tie depends on the inter-parental relationship. Marriage was and, to some extent, continues to be the institution through which the law confers a status on both men and children. The concept of fatherhood itself has historically developed through reference to the legal institution of marriage.⁸¹³ In accordance with the so-called 'marital presumption', children born in wedlock were automatically considered to be the legitimate children of the husband of the mother. Marriage has also been the parameter against which the law has granted the full legal status of fatherhood and parental rights to men.⁸¹⁴ Marriage is therefore the social construct through which the law has historically sought to tie men to children.⁸¹⁵

However, marriage can no longer be considered as an "adequate securer of paternity".⁸¹⁶ In the EU-28, recent decades have witnessed a heightened proportion of live births outside marriage. In 2011, approximately 39% of children were born outside wedlock, compared to approximately 27% in 2000.⁸¹⁷ According to data from 2012, the proportion of children born out of wedlock accounted for the majority of live births in a number of countries, including France (55.8%), Denmark (50.6%), Sweden (54.5%), Belgium (52.3%), Bulgaria (57.4%) and Slovenia (57.6%).⁸¹⁸ Furthermore, based on the available data, the crude marriage rate – namely, the number of marriage per 1000 inhabitants – in the EU-28 has decreased from 7.8 in 1965 to 4.2 by 2011.⁸¹⁹ Apart from occurring less often, marriages have become less stable. The crude divorce rate has actually doubled from 1.0 divorces per 1000 inhabitants in 1970 to 2.0 divorces by 2008.⁸²⁰ This trend has been accompanied by equally high rates of remarrying and the frequent presence of a

⁸¹⁰ Dowd, 'Fathers and the Supreme Court', 1323.

⁸¹¹ *Inter alia*, Dowd, 'Redefining Fatherhood', 182; Simpson et al., 'Fathers After Divorce', 210.

⁸¹² N. Townsend, *The Package Deal: Marriage, Work, and Fatherhood in Men's Lives* (Temple University Press, 2004).

⁸¹³ Collier, 'Masculinity, Law and the Family', 183.

⁸¹⁴ *Ibid.*, 184.

⁸¹⁵ S. Sevenhuijsen, 'The Gendered Juridification of Parenthood' 1992 1(1) *Socio-Legal Studies* 71-83.

⁸¹⁶ Collier, 'Masculinity, Law and the Family', 205.

⁸¹⁷ Eurostat, Marriage and Divorce Statistics (latest data) – online at http://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics (last access on 9 February 2015).

⁸¹⁸ *Ibid.*

⁸¹⁹ *Ibid.*

⁸²⁰ *Ibid.*

stepfather in the lives of many children from divorce families.⁸²¹

In the United States, marriage and extramarital birth are closely connected to race and class.⁸²² The decline of marriage has predominantly concerned Americans without college education, whilst the college-educated population continue to choose marriage.⁸²³ Although to a possibly lesser extent, extra-marital childbearing is ascribable to lower educational attainment and “a pattern of disadvantage” also in most Western European countries.⁸²⁴ As such, unmarried families have often been seen as a social problem, which requires State intervention. At the same time, however, the negative depiction of unmarried fathers as irresponsible and uninterested in their children’s life has been progressively complemented with, if not replaced by, the opposite image as unfairly denied a relationship with their biological children and, as such, as victims of family law: using Sheldon’s powerful words, there has been a certain shift from “absent object of blame”⁸²⁵ to “fathers who want to take responsibility”.⁸²⁶

The efforts to connect children with their biological fathers are attributable to an extensive body of social science research that has emphasised the vital and long-life importance of children’s relationships with both parents.⁸²⁷ Furthermore, the importance of maintaining the relationship

⁸²¹ Dowd, ‘Redefining Fatherhood’, 58.

⁸²² A. Cherlin, ‘The Growing Diversity of Two-Parent Families – Challenges for Family Law’ in M. Garrison and E. Scott (eds.), *Marriage at the Crossroads – Law, Policy and the Brave New World of Twenty-First-Century Families* (CUP, 2012), 290.

⁸²³ See, *inter alia*, J. Carbone and N. Cahn, ‘Red v Blue Marriage’ in M. Garrison and E. Scott, ‘Legal Regulation of Twenty-First-Century Families’ in M. Garrison and E. Scott (eds.), *Marriage at the Crossroads – Law, Policy and the Brave New World of Twenty-First-Century Families* (CUP, 2012), 9-29.

⁸²⁴ B. Perrelli-Harris et al., ‘The Educational Gradient of Nonmarital Childbearing in Europe’ 2010 36 *Population and Development Review* 775-801, cited by M. Garrison and E. Scott, ‘Legal Regulation of Twenty-First-Century Families’ in M. Garrison and E. Scott (eds.), *Marriage at the Crossroads – Law, Policy and the Brave New World of Twenty-First-Century Families* (CUP, 2012), 304.

⁸²⁵ S. Sheldon, ‘From ‘absent objects of blame’ to ‘fathers who want to take responsibility’: reforming birth registration law’ 2009 31(4) *Journal of Social Welfare and Family Law* 373-389.

⁸²⁶ *Ibid.*

⁸²⁷ There is an extended body of literature aimed at demonstrating the centrality to children’s wellbeing of the continuing parental and familial relationships and, more specifically, of the continuing contact between fathers and children. For instance, S. Gilmore, ‘Contact/shared residence and child well-being: research evidence and its implications for legal decision-making’ (2006) 20 *International Journal of Law, Policy and the Family* 344; P. Amato and J. Gilbreth, ‘Non-resident fathers and children’s well-being: a meta-analysis’ (1999) 61(3) *Journal of Marriage and the Family* 557; J. Dunn, H. Cheng, T. O’Connor and L. Bridges, ‘Children’s relationships with their non-resident fathers: influences, outcomes and implications’ (2004) 45 *Journal of Child Psychology and Psychiatry* 553; F. Furstenberg and C. Nord, ‘Parenting apart: patterns of childrearing after marital dissolution’ (1985) 47 *Journal of Marriage and the Family* 893. Moreover, as pointed out by Bainham, the fact that many parents seek and obey contact arrangements might result from the societal appreciation that parents are legally required to continue undertaking this fundamental aspect of their parental responsibility. Additionally, the reality of contact mirrors the dominant view in society that the parent-child relationship is of vital importance and thus ought to be preserved. See A. Bainham, ‘Contact as a Right and Obligation’ in A. Bainham, B. Lindley, M. Richards and L. Trinder (eds.), *Children and Their Families: Contact, Rights and Welfare* (Hart, 2003), 83.

between parent and child has a firm legal foundation in international human rights instruments.⁸²⁸ For instance, the UN Convention on the Rights of the Child (CRC) explicitly enshrines the right of the child to maintain direct and regular contact with both parents, when separated by them, unless similar arrangements are contrary to the best interests of the child.⁸²⁹ Similarly, the European Convention on Contact Concerning Children was conceived to respond to the pressing need to enhance the realisation of the right of children to maintain personal relations and direct contact with both parents on a regular basis as well as to improve the machinery for international cooperation in cases of custody and transfrontier access.⁸³⁰

At the national level, a series of reforms have attempted to reinforce (legal) connections between children and their biological fathers. An increasing tendency has been to place unmarried fathers on an equal footing with married fathers. An enhanced significance of the genetic link as a way of grounding legal fatherhood has been identified as a reaction of legal systems to the crisis of marriage.⁸³¹ In the US context, Dowd has observed a shift from marriage to genes as the basis for establishing legal fatherhood.⁸³² Besides notions of gender equality and children's rights, she argues that the inclusion of unmarried fathers within the definition of legal fatherhood has been primarily motivated by the need to ensure financial support for children.⁸³³ Clearly, this shift has been greatly facilitated by the advent of DNA technology, which has put the validity of presumptions regarding fatherhood – *in primis*, the marital presumption – to the test.

In the UK, for instance, legislative efforts of this kind have culminated in the compulsory requirement of joint birth registration for unmarried parents.⁸³⁴ This measure represents another

⁸²⁸ Bainham, 'Contact as a Right and Obligation', 61.

⁸²⁹ In particular, Article 9(3) of the Convention provides that: "States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests". Even before, Article 7 of the CRC upholds the right of the child, from birth, to know and be cared for by his or her parents.

⁸³⁰ Convention on Contact concerning Children (25 May 2003, entry into force 1 September 2005), online at <http://conventions.coe.int/Treaty/en/Treaties/Html/192.htm> (last access on 10 February 2015) The notion of contact is given a rather wide definition: "(1) the child staying for a limited period of time with or meeting a person mentioned in Articles 4 or 5 with whom he or she is not usually living; (2) any form of communication between the child and such person; (3) the provision of information to such a person about the child or to the child about such a person". Moreover, it is worth noting that 'family ties' are considered to mean "a close relationship such as between a child and his or her grandparents or siblings, based on law or on a *de facto* family relationship". See Article 2.

⁸³¹ Collier and Sheldon, 'Fragmenting Fatherhood'; J. Fortin, 'Parenthood in Child Law – What is its Real Significance?' in D. Pearl and R. Pickford (eds.), *Frontiers of Family Law: Part I* (John Wiley and Sons, 1995).

⁸³² Dowd, 'From Genes, Marriage and Money to Nurture', 132-145.

⁸³³ *Ibid.*, 133.

⁸³⁴ Welfare Reform Act 2009, s. 56. Before the reform, only the unmarried mother had the obligation to register a birth, while the unmarried father could only be registered with the consent of both parents. The Act provides for few exceptions to compulsory joint registration, such as the when it is impossible to trace the father's identity,

example of what Collier and Sheldon refer to as ‘geneticisation’ of understandings of fatherhood; in other words, biology has served to replace marriage in connecting men with children.⁸³⁵ At its core, this reform was mandated by child welfare concerns. In a nutshell, the underlying idea was that mandatory joint birth registration would foster the child’s contact with both parents.⁸³⁶ Given the current climate of decline of marriage, birth registration was proposed as a means of ensuring unmediated and autonomous relationships between fathers and children.⁸³⁷ As such, the reform arguably reflected a remarkable optimism about the desire of fathers to become more involved in their children’s lives and its likely positive impact on broader social problems.⁸³⁸ However, some commentators have pointed out that the origins of this reform had a closer nexus to discussions concerning child support legislation. Among others, Fortin and Wallbank suggest that the ‘real’ objective of compulsory joint registration consisted in making fathers visible for child support purposes, thus alleviating the State’s responsibility to support single mothers.⁸³⁹

Moreover, the significance for the child’s wellbeing of preserving ties with both parents (in line with the predominant legal construct of co-parenting⁸⁴⁰) has translated into legislative initiatives aimed at either ensuring contact with a non-resident parent – in the majority of cases, the father – or promoting a shared residence arrangement in case of separation or divorce. This proliferation of interest has arisen partly out of the evolution of activism and social concern around the issue of fathers’ rights. As explained in Chapter 1, fathers’ rights groups have attempted to

impractical to search for the father’s location, the child is conceived by rape or where joint registration would run counter the child’s and mother’s best interests.

⁸³⁵ Collier and Sheldon, ‘Fragmenting Fatherhood’, 225.

⁸³⁶ Sheldon, ‘From ‘absent objects of blame’’, 377.

⁸³⁷ *Ibid.* Against this background, feminist perspectives, such as that of Reece, have underlined the need to contemplate also the interests of vulnerable women who, by virtue of compulsory joint registration, are forced to reveal intimate information concerning their sexual life and are potentially coerced into relationships that they might wish to escape. The law provides for exceptional situations where the unmarried mother can legitimately refuse to provide the information necessary to identify the father to the registrar – e.g., when the father has died; when his identity and whereabouts are unknown; when she has reasons to fear for her own and her child’s safety in case the father is contacted. However, doubts remain as to whether a young vulnerable woman is actually able to avail herself of these exemptions how the registrar and courts intend to enforce these provisions. See H. Reece, ‘The paramountcy principle: consensus or construct?’ 1996 49 *Current Legal Problems* 303.

⁸³⁸ Sheldon, ‘From ‘absent objects of blame’’, 375.

⁸³⁹ J. Fortin, ‘Children’s right to know their origins – too far, too fast?’ 2009 21(3) *Child and Family Law Quarterly* 352; J. Wallbank, ‘‘Bodies in the shadows’’: joint birth registration, parental responsibility and social class’ 2009 21(3) *Child and Family Law Quarterly* 282.

⁸⁴⁰ G. Wilson, ‘The Non-Resident Parental Role for Separated Fathers: A Review’ 2006 20 *International Journal of Law, Policy and the Family* 286.

“refashion and reposition fatherhood in the legal and cultural imaginary”,⁸⁴¹ by invoking ideas of (formal) equality and relying on the image of the ‘new father’ as carer and sharer of responsibilities. In their views, the law has not kept pace with social reality and new family lives, where many men are and want to be involved not only in paid work but also in childcare and domestic work.⁸⁴²

The influence of campaigning groups has been particularly powerful in the context of post-separation or divorce parenting. The demands of fathers for closer involvement in the emotional lives of their biological children have succeeded in shaping the contours of policy debates concerning contact and shared residence, as well as the content of legislation and the orientation of case-law.⁸⁴³ For instance, the Italian law no. 54/2006 on “provisions relating to parental separation and shared custody of their children” was a direct outgrowth of the lobbying activities carried out by associations of separated fathers.⁸⁴⁴ Theoretically at least, this reform triggered a radical change in the regulation of post-separation family life, by establishing joint custody – as opposed to sole custody – as the default rule. In relation to contact, the amended Civil Code states that “[e]ven in the event of parental separation, the child holds the right to preserve a balanced and continuous relationship with both parents and to receive care, education and instruction from both and to retain relations with his or her ascendants and relatives of each branch”⁸⁴⁵. Accordingly, the law establishes that each parent retains parental responsibility (*potestà genitoriale*), unless his or her behaviour causes serious harm to the child.

Similar attempts to introduce explicit norms on fathering *vis-à-vis* the decline of marriage have been made in other European countries.⁸⁴⁶ In Germany, a new law on child custody entered

⁸⁴¹ C. Smart, ‘The Ethic of Justice Strikes Back’ in A. Diduck and K. O’Donovan (eds.), *Feminist Perspectives on Family Law* (Routledge-Cavendish, 2006), 123.

⁸⁴² Collier and Sheldon, ‘Fragmenting Fatherhood’, 163.

⁸⁴³ *Ibid.*, 159. The work of Helen Rhoades offers a comprehensive account of the general impact of separated fathers’ movements on law and policy: for instance, ‘Contact enforcement and parenting programmes - policy aims in confusion?’ (2004) 16 *Child and Family Law Quarterly* 1-16; H. Rhoades and S. Boyd, ‘Reforming custody laws: A comparative study’ (2004) 18 *International Journal of Law, Policy and the Family* 119-146; H. Rhoades, ‘The Rise and Rise of Shared Parenting Laws - A Critical Reflection’ (2002) 19 *Canadian Journal of Family Law* 75-113.

⁸⁴⁴ J. Long, ‘Post Separation Fathering. The contribution of the ECHR in the protection of children and non-resident parents’ right to mutual enjoyment of each other’s company’ 2014 (1) *Interdisciplinary Journal of Family Studies* 98.

⁸⁴⁵ Article 337 ter, para 1, Italian Civil Code (translation by Long, *ibid.*).

⁸⁴⁶ In addition to the examples in the text, similar reforms on joint custody were introduced in Sweden. See H. Bergman and B. Hobson, ‘Compulsory Fatherhood: The Coding of Fatherhood in the Swedish Welfare State’, in B. Hobson (ed.), *Making Men into Fathers – Men, Masculinities and the Social Politics of Fatherhood* (CUP, 2002), 101-103. In Sweden, joint custody represents the legal tool that keeps the idea of a nuclear family alive after separation/divorce (p. 107).

into force in May 2013. As it will emerge from the following case-law, until recently, child custody was automatically granted to the mother if the parents were not married at the time of childbirth. Unmarried parents could be granted joint custody only through a joint custody declaration. As a result, the mother held veto power over the unmarried father's request for custody rights. In 2010, the Federal Constitutional Court declared these provisions unconstitutional, thus implementing the ECtHR judgments in the case of *Zaunegger v Germany*.⁸⁴⁷ Within the new law, contact with both parents and, consequently, joint custody, are assumed to pursue the best interests of the child.⁸⁴⁸ Accordingly, upon the application of one parent, "the family court is to transfer parental custody or a part of parental custody to both parents jointly unless if the transfer is not inconsistent with the best interests of the child".⁸⁴⁹ The other parent is given a time limit to respond. If he/she fails to put forward any reasons, which might be inconsistent with the award of joint parental custody, and if such reasons are not otherwise evident, joint parental custody is presumed consistent with the best interests of the child.

Although legislation – like the above – tends to employ gender-neutral standards, concerns about the gendered consequences of separation/divorce persist. As argued by Day Sclater and Yates, gender-neutral provisions in the context of post-separation/divorce might result in a "new opportunity for the expression of the old patriarchal powers".⁸⁵⁰ In their view, gender neutrality serves to camouflage men's colonisation of the terrain of motherhood, with no change in their behaviour in relation to childcare, thus reinforcing their claims and rights without benefitting women.⁸⁵¹ Moreover, despite the rethinking of the place of fatherhood in post-separation/divorce scenarios, there is a danger that paternal ties remain mostly biological, legal and financial.⁸⁵²

In many legal systems, the introduction of more invasive mechanisms to collect child support represents a further channel through which the law has sought to enforce male

⁸⁴⁷ Federal Constitutional Court, 21 July 2010 – available online at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100721_1bvr042009en.htm (last access on 18 July 2015).

⁸⁴⁸ Section 1626 of the BGB – online at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5700 (last access on 15 March 2015).

⁸⁴⁹ Section 1626a(2) of the BGB – online at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p5700 (last access on 15 March 2015).

⁸⁵⁰ S. Day Sclater and C. Yates, 'The Psycho-Politics of Post-Divorce Parenting' in A. Bainham et al. (eds.), *What is a Parent?* 289.

⁸⁵¹ *Ibid.*, 288-289. Statistics in care differentials between men and women are provided in the following chapter.

⁸⁵² Fineman, 'Fatherhood, Feminism and Family Law', 1036.

responsibility towards his children.⁸⁵³ From an ideological standpoint, child support perpetuates the assumption that dependency and, therefore, the welfare of children, is a private concern.⁸⁵⁴ Clearly, the notion of responsibility endorsed by these measures is consistent with the gendered nature of the conventional ideology of the family and, more specifically, with the traditional role of the father as the breadwinner.⁸⁵⁵ Child support policies seek to “reconstruct the gendered complementarity of the traditional family through the imposition of the economically viable male”.⁸⁵⁶ While being consistent with the fact that mothers continue to represent a huge disproportion of primary residential parents,⁸⁵⁷ this account does not take into consideration that many caring mothers who become single parents do not rely solely on child support. Rather, they are often faced with the predominant expectation of a double shift and with financial hardship following divorce and, as a result, they find themselves engaged in both paid employment and unpaid care work.⁸⁵⁸

Having regard to the Italian situation, the above-mentioned reform (law no. 54/2006) has had a visible impact in terms of patterns of custody decisions: in 2011, sole custody to the mother was chosen in a tiny minority of cases (8.5%), whilst joint custody was granted in 90.3% cases of

⁸⁵³ *Ibid.* On child support reforms in the UK, see Collier and Sheldon, ‘Fragmenting Fatherhood’, 150-153; on child support reforms in Germany, see I. Ostner, ‘A new role for fathers? The German case’ in B. Hobson (ed.), *Making Men into Fathers – Men, Masculinities and the Social Politics of Fatherhood* (CUP, 2002), 162-163. Fathers’ rights groups continue to raise serious concerns about the perceived injustice inflicted by post-divorce financial arrangements. In Italy, see, for instance, P. Guenzi, ‘Lo Stato fa di tutto per indebitare i padri separati e divorziati – Ex mogli e compagne contro una riforma che impedisce ai papà di rifarsi una famiglia’, 30 November 2014, *Il Caffè* – online at http://epaper2.caffè.ch/ee/ilca/main_/2014/11/30/008/ilca-main_-2014-11-30-008.pdf (last access on 17 March 2015). Interestingly, not only fathers’ groups but also associations of reconstituted families, mono-parental families and female partners of separated/divorced men have expressed their opposition to the pending family law reform, which aims to increase men’s payments to his former partner (even if not married) and his child. The underlying idea is that, in order to be able to pay alimony and child support, fathers will be obliged to work longer hours, with limited time to spend with their children.

⁸⁵⁴ M. Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004), 203. See also Bergman and Hobson, ‘Compulsory Fatherhood’, 94, where they explain that, in Sweden, before the 1960s, the State suggested formalising the maintenance obligation for unmarried fathers as a means of addressing poverty among children born out of wedlock. The same argument was also put forward in the UK and in Germany. On the UK, see Collier and Sheldon, ‘Fragmenting Fatherhood’, 151 and J. Lewis, ‘The problem of fathers: policy and behavior in Britain’ in B. Hobson (ed.), *Making Men into Fathers* (CUP, 2002), 125. On Germany, see I. Ostner, ‘A new role for fathers?’, 162.

⁸⁵⁵ Fineman, ‘Fatherhood, Feminism and Family Law’, 1036; Dowd, ‘Redefining Fatherhood’, 145. Given that a ‘good’ father is still correlated to being a good provider in the imaginary of many parents, child support payments are sometimes seen as a “proxy for love”, especially when fathers are concerned. See C. Smart, ‘Parenting disputes, gender conflict and the courts’ in L.J. Thorpe and E. Budden (eds.), *Durable Solutions* (Jordans, 2006), 107.

⁸⁵⁶ Fineman, ‘The Autonomy Myth’, 203.

⁸⁵⁷ Kielty, ‘Mothers as non-resident parents too’, 1; Fineman, ‘Fatherhood, Feminism and Family Law’, 1037.

⁸⁵⁸ As closely connected, it seems interesting to observe ongoing legislative reforms which attempt to redesign spousal support rules to make women resume paid employment.

separation.⁸⁵⁹ Nonetheless, a study based on the analysis of 1020 judgments issued by Italian courts in the period 2006-2011, demonstrates that the new provisions, as currently applied, have done little more than paying lip-service to the principle of joint custody.⁸⁶⁰ In practice, by coining the concept of ‘primary domicile’ (*domicilio prevalente*), courts have continued to identify one parent as ‘resident parent’ (*genitore collocatario*), responsible for lodging and daily care, and to confer contact rights on the other parent.⁸⁶¹ As a result, the actual content of the rights held by non-custodial parents (primarily fathers) have remained almost unaltered: contact arrangements granted to a co-custodial non-resident parent are *de facto* very similar to that enjoyed by a non-custodial parent (every other weekend, two weeks in the summer and some holidays).⁸⁶²

As effectively argued by Bergman and Hobson, although in relation to joint custody legislation in Sweden, “obligatory joint custody is about compulsory fatherhood rather than compulsory fathering”.⁸⁶³ What is implicit in the coding of post-separation/divorce fatherhood is the assumption that the best interests of the child resonates with having contact with both biological parents, even if the contact with the father can only amount to having a father who holds custodial rights.⁸⁶⁴ Compulsory joint custody – and, therefore, the maintenance of contact with both biological parents – can be viewed as a way of continuing a stable family unit, namely a fictional group made of a father, mother and child.⁸⁶⁵

More generally, this account reflects Collier’s view, according to which the role historically played by the institution of marriage in determining legal status has been progressively supplemented, if not replaced, by other ‘organising concepts’, such as cohabitation.⁸⁶⁶ The latter has increasingly resembled the institution of marriage concerning its legal consequences on both the status of children and property entitlements at separation. Especially through reference to the principle of the best interests of the child, certain marriage-type relationships – in particular, heterosexual cohabitation – have been increasingly considered, regulated and comprised within a

⁸⁵⁹ ISTAT, <http://www.istat.it/it/archivio/91133> (last access on 16 March 2016). Concerning divorces, joint custody was granted in 73.8% of cases in 2010. See Long, ‘Post separation fathering’, 100.

⁸⁶⁰ A. Cardinale, ‘Affido condiviso dei figli. Una legge disapplicata’ online at <http://www.imille.org/2011/04/affidamento-condiviso-dei-figli/> (last access on 16 March 2015).

⁸⁶¹ *Ibid.*

⁸⁶² Long, ‘Post separation fathering’, 100.

⁸⁶³ Bergman and Hobson, ‘Compulsory Fatherhood’, 103.

⁸⁶⁴ *Ibid.*, 101, 103.

⁸⁶⁵ *Ibid.*, 103.

⁸⁶⁶ Collier, ‘Masculinity, Law and the Family’, 205.

“reconstituted familial domain”.⁸⁶⁷ These developments are indicative of a persisting focus on the adult relationship (horizontal) as a means of defining vertical relationships between a parent and his/her child. Hence, the latter continues to be mediated by the former.

The importance of contact in a child’s life has achieved such force that, it is suggested by Bainham, it almost operates as a “fundamental presumption which may be rebutted – but only for good reason”.⁸⁶⁸ The characterisation of contact as a right has triggered concerns among some feminist scholars, who spot a problematic gendered dimension within this issue. One of their main claims underlines that, while separated/divorced mothers tend to frame their relationships with children in terms of needs and responsibilities, fathers talk mainly about rights and, additionally, are viewed as right-bearers by the legal system.⁸⁶⁹ Moreover, it has been argued that fathers find themselves in a better position to engage in legal proceedings to obtain custody because they tend to dispose of greater financial means.⁸⁷⁰ Against this, given their greater poverty, mothers might be forced to give up custody or agree on joint custody, against their wishes.⁸⁷¹ As a result, at least in certain contexts, the success rate of fathers contesting custody tends to be relatively high: around 50% in Canada and from 38 to 70% in the United States.⁸⁷²

Furthermore, the perceived fundamental importance of contact has sometimes given rise to an expectation that both parents recognise and ensure the promotion of child welfare through contact.⁸⁷³ Accordingly, residential mothers are expected to behave like responsible parents by facilitating contact and non-residential fathers by assuming contact.⁸⁷⁴ Once again, however, the gender-neutral standard of responsible parent might *de facto* end up punishing the residential

⁸⁶⁷ *Ibid.*, 206.

⁸⁶⁸ Bainham, ‘Contact as a Right and Obligation’, 75.

⁸⁶⁹ Look at the interviews included in Day Sclater and Kaganas, ‘Contact: Mothers, Welfare and Rights’, 155-169.

⁸⁷⁰ *Ibid.*

⁸⁷¹ S. Crean, ‘Anna Karenina, Scarlett O’Hara, and Gail Besaire: Child Custody and Family Law Reform’ in A. Minas (ed.), *Gender Basics* (Wadsworth, 1993), 508-513.

⁸⁷² S. Boyd, *Child Custody, Law and Women’s Work* (OUP, 2003), 8 quoted by J. Sterba, ‘Marriage, Divorce and Child Custody’ in W. Farrell with S. Svoboda, J. Sterba, *Does Feminism Discriminate Against Men? A Debate* (OUP, 2008), 191-192.

⁸⁷³ J. Wallbank, ‘(En)Gendering the fusion of rights and responsibilities in the law of contact’ in J. Wallbank, S. Choudhry and J. Herring (eds.), *Rights, Gender and Family Law* (Routledge-cavendish, 2009), 101. This idea of parental responsibility falls within a wider model of ‘divorcing responsibly’, as conceptualised by Reece. See H. Reece, *Divorcing Responsibly* (Hart, 2003). According to Sheldon and Collier, this model is consistent with a new role of the law in post-separation/divorce scenarios, namely that of reduce conflict and facilitate consensus among the parties. See Collier and Sheldon, ‘Fragmenting Fatherhood’, 158. Apparently, also within Swedish law and policy on divorce and joint custody, there is an assumption of amicable divorce. See Berman and Hobson, ‘Compulsory Fatherhood’, 101.

⁸⁷⁴ Wallbank, ‘(En)Gendering’, 101.

mother.⁸⁷⁵ Some scholars have pointed out that the judicial assessment of parental responsibility tends to follow a double standard.⁸⁷⁶ An extra burden is often placed on mothers in terms of managing family life in the post-separation context: mothers are hailed to be friendly and accommodating to enable non-residential fathers to undertake their desired parental duties.⁸⁷⁷ As a result, a mother who does not act responsibly by hindering contact has been often described as ‘hostile’, along the lines of the very negative depiction of women put forward by fathers’ rights movement.⁸⁷⁸ However, it is argued, no similar label has ever been attached to fathers who fail to have contact with their children.⁸⁷⁹ This double standard, therefore, might have the effect of “supporting a free-floating concept of rights which has no commensurate presumption about responsibilities”.⁸⁸⁰

The construction of fatherhood as a mutually beneficial relationship between fathers and their children has led to and strongly supported the opinion that denial of contact is a cause of suffering for both of them.⁸⁸¹ Obviously, a narrow approach to contact as a ‘father-child only’ issue or an excessive emphasis on the positive advantages for the child of continuing contact with his/her father (‘children need fathers’) entail two main risks: subsuming the best interests of the child by those of the father, thus denying the former separate treatment and addressing the issue of contact as an issue of equality between the mother and the father; ignoring the potential spillover of contact on the wellbeing of the residential mother – such as, violence. As pointed out by Sterba, women are at higher risk of battery by their former partners after separation;⁸⁸² and, it is no coincidence that a common complaint made in feminist critiques of judicial treatment of child contact cases is that judges allow men to exercise control and power over mothers or, even more, they fail to take instances of domestic violence seriously.⁸⁸³

⁸⁷⁵ *Ibid.*

⁸⁷⁶ C. Smart and B. Neale, ‘Arguments against virtue – must contact be enforced?’ 1997 27 *Family Law* 336.

⁸⁷⁷ Wallbank, ‘(En)gendering’, 109.

⁸⁷⁸ J. Wallbank, ‘Castigating mothers: the judicial response to ‘willful’ women in disputes over paternal contact in English law’ 1998 20(4) *Journal of Social Welfare and Family Law* 357-376.

⁸⁷⁹ Wallbank, ‘(En)gendering’, 101.

⁸⁸⁰ Bainham, ‘Contact as a Right and Obligation’, 86 quoting C. Smart and B. Neale, ‘Arguments against Virtue – Must Contact be Enforced?’ 1997 27 *Family Law*.

⁸⁸¹ Wallbank, ‘(En)gendering’, 102.

⁸⁸² Sterba, ‘Marriage, Divorce and Child Custody’, 191.

⁸⁸³ H. Reece, ‘UK women’s groups’ child contact campaign: ‘so long as it is safe’ 2006 18(4) *Child and Family Law Quarterly* 538; R. Bailey-Harris, J. Barron and J. Pearce, ‘From utility to rights? The presumption of contact in practice’ 1999 13 *International Journal of Law, Policy and the Family* 111-131.

To conclude, the issues of contact and joint custody do not constitute isolated experiences between the father and his child.⁸⁸⁴ Recognising the importance of a father-child relationship through issuing joint custody and/or contact orders and ensuring their implementation pursues and sometimes achieves the laudable aims of respecting the right to respect for family life of both children and non-residential fathers and of promoting gender equality in the domain of care. At the same time, however, feminist commentators have underlined the importance of acknowledging and adequately reacting to the gendered pattern of the investments – such as, financial support and nurture – made by the parents during their relationship.⁸⁸⁵ As clearly expressed by Wallbank, legal approaches to contact should not be excessively concerned with re-envisioning society in accordance with the aspirational ideal of fatherhood.⁸⁸⁶ Rather, they should “value and attend to the gendered realities of mothers’ and fathers’ lives” while their relationship was intact.⁸⁸⁷ Therefore, whilst seeking to enhance father participation, judges must be aware of the risk of devaluing or overlooking “the social importance of mothers and mothering”.⁸⁸⁸ These dilemmas reflect some of the theoretical questions advanced in Chapter 1 as to the role of the law, namely whether the law should recognise a reality where women do more care and compensate for gender role differences or, rather, attempt to transform such reality.

2. The Role of Marriage in Creating Family Life under Article 8 ECtHR

In metaphorical terms, the disruption of family has resulted in the ‘Herculean knot’,⁸⁸⁹ binding men and their children to become loosened or untied. If analysed through the lens of the traditional ideology of the family, both the emergence of unmarried families and increasing family breakdown

⁸⁸⁴ J. Dunn, ‘Contact and Children’s Perspectives on Parental Relationships’ in in A. Bainham, B. Lindley, M. Richards and L. Trinder, *Children and Their Families: Contact, Rights and Welfare* (Oxford, Hart, 2003), 20.

⁸⁸⁵ Wallbank, ‘(En)gendering’, 116; Boyd, ‘Child Custody, Law and Women’s Work’, chapter 7; McGlynn, ‘Families and the EU’, 89. On the different investments made by mothers and fathers, see also Fineman, ‘Fatherhood, Feminism and Family Law’, 1041. Fineman argues that, although economic provision contributed to the wellbeing of the child, it does not have the same consequences in the post-divorce context, when you compare to nurturing. Paid work, which generates economic provision, is also a self-investment because it enhances one’s professional skills. On the contrary, nurturing hinders the development of professional skills, thus compromising one’s market position.

⁸⁸⁶ Wallbank, ‘(En)gendering’, 117.

⁸⁸⁷ *Ibid.*, 116.

⁸⁸⁸ R. Collier, ‘Fathers 4 Justice, law and the new politics of fatherhood’ 2005 17 *Child and Family Law Quarterly* 525.

⁸⁸⁹ Sir Thomas More, quoted by Simpson et al., ‘Fathers after Divorce’, 201.

rates have posed serious threats to the institution of marriage, as the ground for legal fatherhood and the associated rights and responsibilities. In cases of parental separation/divorce, the end of the marital tie literally resonates with the termination of marriage; while, in the other scenario – unmarried families – the end of marriage is *in primis* symbolically represented by the couple's choice not to formalise their union and, potentially, by the subsequent breakdown of their relationship. In both situations, marriage ceases to act as a channel through which the father-child relationship forms and develops itself. As a result, the law has to look for an alternative connector.

The traditional paradigm of the family can be further confused by the appearance of a third party who, in the capacity of the resident parent's new partner, acts as a social parent towards the child. In such cases, the resulting family arrangement no longer fits into the conventional bi-parental structure. In this scenario, therefore, the legal question to be addressed has often been 'who between the biological and the social father is given preference?', rather than 'how can they be both accommodated within the child's life, provided that they both make distinct contributions to his/her life?'⁸⁹⁰ There is an additional conventional feature that is called into question in separation scenarios: the gendered division of labour. In fact, as previously mentioned, national legal systems continue to give precedence to mothers over fathers in custody-related disputes, while holding fathers and mothers financially responsible for the needs of their children. This has contributed to perpetuating a gendered division – as opposed to a sharing – of parental responsibilities even after parental separation. On the one hand, as the resident parent, the mother tends to remain the primary caretaker and is often also involved in paid employment. On the other hand, the father's monetary contribution to their children's life runs the risk of him being reduced to economic provision.

If transposed into the ECHR framework, heterosexual married families are at the top of the evidentiary hierarchy.⁸⁹¹ They are automatically granted the status of 'family life' by virtue of their demonstrated intention to create family life through marriage. It is no coincidence, therefore, that the Strasbourg machinery has been criticised for privileging the conventional family model over other forms of relationship. Nonetheless, the Court has often recalled that marriage remains an institution that is widely accepted as conferring a special status on those who entered it and, as

⁸⁹⁰ Bainham, 'Parentage, Parenthood and Parental Responsibilities', 27.

⁸⁹¹ Choudhry and Herring, 'European Human Rights and Family Law', 167; Rainey et al., 'The European Convention on Human Rights', 337.

such, can serve as a justification for differential treatment.⁸⁹² It is not by chance that the right to marry is protected by Article 12 of the ECHR, which reads that “men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”. Apart from reflecting the conventional family model at the time of the drafting of the Convention, the maintenance of marriage as the privileged family form might also mirror the legislative reality of most Contracting States.⁸⁹³ Consequently, the persisting importance of marriage can be viewed as a direct consequence of the doctrine of the margin of appreciation.⁸⁹⁴

As stated in the introduction, this chapter attempts to investigate the reaction of the ECtHR to the overall decline of marriage as the interface between men and their children and, as such, as the basis for allocating parental rights. More specifically, it wishes to identify the factor(s) which the Court resorts to, in the absence of marriage; in other words, what type of tie – biological, nurturing, marriage-like – is relied on by the Court to either hold the incompatibility of denying an unmarried/divorced father contact with or custody over his child within the Convention framework or to justify its interference with the right to respect for family life of the father involved.

Thus, the Court’s ability to challenge the conventional ideology of fatherhood in this jurisprudential domain will be assessed at multiple levels: firstly, by considering whether the Court finds family life to exist between an unmarried father and his child born out of wedlock as well as between a divorced father and his biological child, respectively. If so, what elements are considered relevant for a father-child tie to fall within the notion of family life? More specifically, is the relationship between the natural parents still taken into consideration? If so, to what extent and what are the implications? If marriage is no longer a prerequisite for obtaining paternal rights, it will be interesting to assess whether other marriage-type relationships have taken its place and, therefore, whether it is possible to talk of a ‘revisitation’ of the concept of marriage or, on the contrary, the focus on horizontal relationships has gone once and for all. Another crucial question

⁸⁹² *Inter alia*, *Shackell v the UK*, Application no. 45851/99, 27 April 2000; *Burden v the UK*, Application no. 13378/05, 29 April 2008 (Grand Chamber), para 63; *Van Der Heijden v the Netherlands*, Application no. 42857/05, 3 April 2012, para 69.

⁸⁹³ Choudhry and Herring, ‘European Human Rights and Family Law’, 167.

⁸⁹⁴ *Ibid.*

to address in order to test the Court's departure from the conventional paradigm of fatherhood is whether any weight is attached to biology.

Finally, bearing in mind the 'principle of mutuality' as interpreted by Bainham, the following case-law analysis will investigate the extent to which the Court has acknowledged the relational dimension of the right to contact and has taken the multiple parties involved (child, biological father, mother, step-father) into consideration. Separation and divorce are known as contexts where tensions among concurring interests and rights are further intensified by the entrenchment of one-sided narratives and the consequential essentialisation of 'mother' and 'father', 'woman' and 'man'.⁸⁹⁵ The establishment of positive interactions between parents after family dissolution might be compromised by the profound divergence existing between the perspectives of mothers and fathers on post-separation/divorce parenthood.

Women's perceptions of the difficulties arising out of contact cases predominantly allude to the deficiencies of fathers.⁸⁹⁶ More specifically, mothers stress fathers' lack of experience in nurturing activities, their scant or absent involvement in the past, and their potential inadequacy to act as good parents in the future.⁸⁹⁷ Consequently, where childcare arrangements fail, former wives depict fathers as irresponsible, careless, unreliable, deceitful and selfish.⁸⁹⁸ In particular, non-resident fathers are commonly blamed for arriving late for visits, for being inconsistent in maintaining contact and for being inattentive to the negative implications of their behaviour on their children's wellbeing.⁸⁹⁹

From the fathers' standpoint, men should be accorded the opportunity to meaningfully participate in their children's lives, not only as (absent) financial providers, but also as (present) emotional carers.⁹⁰⁰ Accordingly, the most frequent reason that non-resident fathers offer regarding the loss of contact consists in residential mothers' implacable hostility and unreasonable

⁸⁹⁵ Fineman, 'The Neutered Mother, the Sexual Family', 202; K. Kaganas and S. Day Sclater, 'Contact Disputes: Narrative Constructions of "Good" Parents' 2004 12(1) *Feminist Legal Studies* 1-27. Based on interviews conducted in England and Wales, mothers constructed their opposition to contact in the name of their children's welfare, while resisting the label of 'vindictive bad mothers'. On the other hand, fathers often explained their children's unwillingness to have contact with them through reference to the image of the vengeful woman.

⁸⁹⁶ L. Nielsen, 'Demeaning, Demoralizing, and Disenfranchising Divorced Dads: A Review of the Literature' 1999 31(3/4) *Journal of Divorce and Remarriage* 141-146 (section on 'Misconceptions about Divorced Fathers').

⁸⁹⁷ S. Day Sclater and F. Kaganas, 'Contact: Mothers, Welfare and Rights' in A. Bainham, B. Lindley, M. Richards and L. Trinder, *Children and Their Families: Contact, Rights and Welfare* (Oxford, Hart, 2003), 161.

⁸⁹⁸ Simpson et al., 'Fathers after Divorce', 205.

⁸⁹⁹ *Ibid.*

⁹⁰⁰ See, *inter alia*, J. Arditti and K. Allen, 'Distressed fathers' perceptions of legal and relational inequalities post-divorce' 1993 31 *Family and Conciliation Courts Review* 461-476.

obstruction of contact.⁹⁰¹ Mothers are, therefore, depicted as liars who would do anything in order to obtain the custody of their children, including inventing allegations of child abuse against the fathers.⁹⁰² As a result, mothers are structurally placed in opposition to fathers and, essentially, in opposition to their children, whose best interests are interpreted as resonating with those of fathers.⁹⁰³

In light of such hostility between the sexes (institutionalised through the organisation of women and men in gendered interest groups), it is not surprising that children, like any other asset of the family, offer a further terrain of conflict between men and women when their relationship ends.⁹⁰⁴ As a result of the polarisation of mothers' and fathers' positions, children find themselves in the "vortex of backlash".⁹⁰⁵ Custody determinations, therefore, might become an issue of equality between mothers and fathers.⁹⁰⁶ In light of this, it will be interesting to observe whether the risk of placing children 'outside' legal disputes,⁹⁰⁷ thus neglecting their experiences and treating them as mere objects of privilege⁹⁰⁸ is also present within the approach of the ECtHR.

The relevant jurisprudence is divided into two sub-groups, depending on whether the applicants are unmarried or divorced fathers. This separation is meant to offer a further analytical lens: that of discrimination on grounds of marital status. As it will emerge from the cases brought against Germany, divorced fathers have often been granted contact rights *ipso jure*, whilst unmarried fathers have been required to prove their suitability for contact by obtaining either a court order or the mother's consent. Therefore, despite divorce, the marital origin of the relationship between the natural parents has tended to benefit divorced fathers and their children. This trend is confirmed by the nature of the claims brought by divorced fathers. Different from unmarried fathers who have abundantly complained of refusal of contact/custody rights, divorced

⁹⁰¹ See J. Bradshaw, C. Stimson, C. Skinner and J. Williams, *Absent Fathers?* (London, Routledge, 1999). Similarly, Boyd speaks of 'demonizing discourses' emerging from the fathers' rights movement in the Canadian custody law reform process in the late 1990s. See S. Boyd, 'Demonizing Mothers', 52-74. See also Kaye and Tolmie, 'Discoursing Dads', section on 'Negative Depictions of Women', 184-190.

⁹⁰² Fineman, 'The Neutered Mother, the Sexual Family', 119.

⁹⁰³ *Ibid.*, 201.

⁹⁰⁴ Fineman, 'The Neutered Mother', 665.

⁹⁰⁵ *Ibid.*

⁹⁰⁶ Fineman argues that, more generally, the emphasis on doing justice between the adults derives from the notion of family being culturally and legally based on a relationship between adults – e.g., the status of children as legitimate or illegitimate child depends on whether the parents are married. See Fineman, 'The Neutered Mother', 664.

⁹⁰⁷ *Ibid.*

⁹⁰⁸ C. Smart and B. Neale, "'It's My Life Too" – Children's Perspectives on Post-Divorce Parenting' 2000 *Family Law* 163-169; V. May and C. Smart, 'Silence in Court? Hearing Children in Residence and Contact Disputes' 2004 16(3) *Child and Family Law Quarterly* 305-315.

fathers have been mostly involved in cases concerning the failed enforcement of existing contact orders.

2.1 Unmarried Fathers Seeking Contact and Joint Residence

In order to make the analysis easier to follow, the case-law involving biological fathers seeking to obtain contact or custody rights with their children born out of wedlock will be split into two sub-sections. The first includes those cases, where the opposition to contact/joint custody comes from the child's mother. In the second sub-section, as an alternative, the applications stem from the child's secret placement for adoption without the knowledge and consent of the father. As a consequence of either event, the applicant fathers were denied contact and/or custody rights and brought a complaint of a violation of their right to respect for family life, which was sometimes taken in conjunction with Article 14.

Out of eight cases, the Court found a violation of Article 8 or Article 14 taken in conjunction with Article 8 in all but one of the cases considered. This is a clear sign of the fact that the Court takes the claims of unmarried fathers seriously. Despite an increasing reliance on the actual circumstances of the case, aimed at grasping the quality of the relationship between the applicant and his child, the nature of the parental relationship continues to be drawn on as a relevant factor to reach the threshold of 'family life' (in other words, to establish whether family life exists between a father and his child born out of wedlock) as well as to conclude whether the applicant's right to respect for family life has been violated.

2.1.1 Standard cases: Maternal Opposition to Contact or Joint Custody

This section deals with cases brought by biological (in one case, alleged biological) fathers seeking to obtain contact or custody rights with respect to their children born out of wedlock, against the will of their former partner (the child's mother). Although it is clearly not the latest judgment on this issue, the position held in the case of *Sahin v Germany*⁹⁰⁹ remains representative of the Court's approach, at least in relation to two distinct aspects: the undertaking of an anti-stereotyping approach and the *prima facie* overcoming but *de facto* mere revisitation of the conception of marital fatherhood. After outlining the Court's position in the case of *Sahin*, it is worth expanding

⁹⁰⁹ *Sahin v Germany*, Application No. 30943/96, 11 October 2001 (Chamber); 8 July 2003 (Grand Chamber). The facts and the Court's decision in the case of *Sahin* are exactly the same as in the case of *Sommerfeld v Germany*, Application no. 31871/96, 11 October 2001 (Chamber); 8 July 2003 (Grand Chamber).

the analysis to other cases, which, by building on the ruling in *Sahin*, have brought additional elements to the table.

In the case of *Sahin*, the applicant met Ms D. in 1985 and he moved into her flat in December 1987. In 1988, a child was born out of their relationship. He acknowledged paternity and undertook to pay maintenance. They ceased to cohabit in July 1989 or, as stated by the applicant, in February 1990. In any event, he continued to see his child and former girlfriend until February 1990 and, between July and October 1990, he regularly met his child for visits. From November 1990, Ms D. prohibited any contact between him and his daughter. His request to be granted a right of contact with the child was dismissed by the District Court on the basis of a section in the German Civil Code, according to which unmarried fathers could only have contact with the child if the mother's child approved or if this was found to be in the best interests of the child by a court ruling.⁹¹⁰

Before the Strasbourg Court, the applicant contended that the German courts' decision dismissing his request amounted to a violation of his right to respect for family life under Article 8 of the Convention. In particular, the father of the child alleged that, having regard to the specific circumstances of the case, the national authorities had overstepped their margin of appreciation, since he had not been sufficiently involved in the decision-making process.⁹¹¹ In response, the Government advanced two main reasons justifying the refusal of contact; namely the inevitably negative repercussions of the serious tensions existing between the parents on their daughter's wellbeing as well as the risk that contact visits would disturb and frustrate the child's development in the single-parent family provided by the mother.⁹¹²

Firstly, the Court failed to consider the applicability of Article 8 and, therefore, whether the relationship between the applicant and his child amounted to family life. It merely stated that it shared the view – held by the parties – that the refusal of contact rights constituted an interference with the applicant's right to respect for family life.⁹¹³ Arguably, the Court might have inferred the applicability of Article 8 from the mere fact that the applicant and the child's mother cohabitated at the time of birth and continued to do so for the following year. As argued by O'Mahony, the stance adopted in *Sahin* possibly reflects a wider trend, according to which, whenever the

⁹¹⁰ *Sahin v Germany* (Grand Chamber), para 16.

⁹¹¹ *Ibid.*, para 55.

⁹¹² *Ibid.*, para 67.

⁹¹³ *Ibid.*, para 49.

biological parents lived together at the time of childbirth, the father's degree of contribution to raising the child is not necessarily a relevant factor, at least for the purpose of establishing the existence of family life.⁹¹⁴

Prior to determining whether the reasons provided by the Government amounted to sufficient justifications for the purposes of Article 8(2), the Court noted that national authorities were better placed to take a decision as they benefited from closer contact with the parties involved.⁹¹⁵ As a result, the Court's role was simply to review (rather than replace) the decisions taken by these authorities in their exercise of the margin of appreciation.⁹¹⁶ However, different from custody matters – where States enjoy a wide margin of appreciation – restrictions placed on contact rights call for a stricter scrutiny since, the Court argues, these limitations entail the risk that the relationship between a young child and his/her parent(s) would be effectively damaged.⁹¹⁷ Furthermore, it held that Article 8 required States to place particular weight on the best interests of the child when striking a fair balance between all interests involved.⁹¹⁸

Having regard to the particular case, the Court was of the opinion that German courts had put forward relevant reasons justifying their refusal of access, namely the detrimental impact that the tensions between the parents would have had on the child.⁹¹⁹ However, it was held that, in order to properly assess whether the justifications adduced by the Government were sufficient, it was also necessary to verify whether the procedural requirements implicit in Article 8 were met. Indeed, when decisions, such as placing restrictions on parental rights or placing children for adoption or in public care, are to be taken, Article 8 requires that emphasis be placed on the development of national proceedings.⁹²⁰ More specifically, the Court explained that, in light of its potentially irreversible consequences on the parent-child relationship, the decision-making process had to ensure sufficient protection of the father's interests.⁹²¹ In this regard, it was observed that

⁹¹⁴ C. O'Mahony, 'Irreconcilable Differences? Article 8 ECHR and Irish Law on Non-traditional Families' 2012 26(1) *International Journal of Law, Policy and the Family*, 35. Another example is provided by the judgment in the case of *Kroon and Others v the Netherlands*, cohabitation with the child's mother sufficed to find family life, whatever the father's contribution to the child's care and upbringing.

⁹¹⁵ *Ibid.*, para 64

⁹¹⁶ *Ibid.*

⁹¹⁷ *Ibid.*, para 65.

⁹¹⁸ *Ibid.*, para 66.

⁹¹⁹ *Ibid.*, para 67.

⁹²⁰ Rainey et al., 'The European Convention on Human Rights', 343.

⁹²¹ This was first established in the case of *W v UK*, Application no. 11095/84, 7 March 1989, para 64.

the father had been able to put forward all arguments in order to obtain contact arrangements and he was also granted access to all relevant information that was relied on by the authorities.⁹²²

It was further noted that the Regional Court had ordered an expert report investigating whether contact was in the child's best interests and, on the basis of that report, had preferred not to hear the child in court.⁹²³ The Court agreed with the decision taken by the Regional Court or, at least, did not contest the decision on the ground that, as a general rule, it falls within the competence of the State to determine the means to ascertain the facts of the case.⁹²⁴ As stated by the Court, "it would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not having custody".⁹²⁵ Therefore, having regard to the State's margin of appreciation, it was concluded that the German courts had ensured the necessary protection of the applicant's interests and that, accordingly, there had been no violation of Article 8.⁹²⁶

Therefore, although the matter at stake concerned restrictions placed on parental rights and, as such, would generally entail a narrow margin of appreciation, the Court's reliance on the 'better placed' argument seems to have prevailed and played a role in determining the finding of non-violation of Article 8. The ground that grants the State a wide margin relates to the supranational nature of the Court; and, in light of Letsas' account, it is not totally surprising that the application of the doctrine in its structural variant ended up lowering the standard of review and, with regards to the determination of the best interests of the child, resulted in total deference. Given that national authorities enjoyed closer contact with the parties and were, therefore, better positioned to grasp the needs of all those involved, the Court argued that it had no cause to question the professional competence of the expert appointed by the Regional Court or the way in which she interviewed the child. As a result, the complaint brought under Article 8 was considered only from a procedural viewpoint.

⁹²² *Ibid*, para 71.

⁹²³ *Ibid*, para 72.

⁹²⁴ *Ibid*, para 73.

⁹²⁵ *Ibid*.

⁹²⁶ On the procedural requirements under Article 8, see also *Elsholz v Germany*, which arose from the refusal to grant a father contact rights with respect to his child born out of wedlock. Different from in *Sahin*, in the case of *Elsholz*, the Court found a violation of Article 8 because no adequate steps had been taken to enable a non-custodial parent to have contact with his child; in particular, the combination of the refusal to order an independent psychological report and the absence of a hearing before the Regional Court revealed the applicant's insufficient involvement in the decision-making process.

The failed hearing of the child in court and, more importantly, its acceptance by the majority cast doubts as to the actual weight accorded to the views of the child *vis-à-vis* the hostility of the mother. Apart from not hearing the child in person, it emerged that the expert appointed by the Regional Court had not even asked the child about her father.⁹²⁷ Although the desires of a 5-year-old girl cannot be given conclusive weight, exhaustive and reliable information on the child's relationship with her biological father constitutes an essential element for determining the child's true feelings and wishes and, consequently, for striking a fair balance among the various interests at stake.⁹²⁸

However, given the legislative regime in place, it cannot be excluded that the child was denied independent voice and the mother's hostile feelings towards the applicant were accorded primary importance, almost *a priori*. As argued by the dissenting Judges Rozakis and Tulkens, it almost seems that the courts' decision to deny contact rights to the applicant was grounded on a mere hypothesis that the preservation of the father-child tie was not in her best interests due to her mother's adverse attitude towards her former partner.⁹²⁹ By sharing the national courts' decision, the Court proved unaware of the permanent implications stemming from denial of contact on the applicant's and child's right to respect for family life. In fact, as underscored by Judge Rozakis and Tulkens, the prohibition of contact represented a radical measure, which not only infringed temporarily upon their right to family life, but also totally demolished it.⁹³⁰ At the same time, however, regard must be paid to a sizeable body of literature – although not unanimous – that demonstrates a negative impact of inter-parental conflict, including post-separation conflict, on the wellbeing of the child.⁹³¹ For instance, it has been found to increase children's stress, to give rise to loyalty conflicts and to indirectly jeopardise parental consistency in discipline.⁹³² Apart from alleging a violation of Article 8, the applicant complained that he had been victim of discriminatory

⁹²⁷ *Sahin v Germany* (Chamber), paras 47 and 48.

⁹²⁸ *Ibid*, para 48.

⁹²⁹ *Sahin v Germany* (Grand Chamber), Partly Dissenting Opinion of Judge Rozakis joined by Judge Tulkens, para 1.

⁹³⁰ *Ibid*, para 2.

⁹³¹ For instance, see P. Amato, S. Rezac, 'Contact with Nonresident Parents, Interparental Conflict and Children's Behaviour' 1994 15(2) *Journal of Family Issues* 191; E. Hetherington, M. Cox and R. Cox, 'Effects of Divorce on Parents and Children' in M. Lamb (ed.), *Nontraditional Families: Parenting and Child Development* (Lawrence Erlbaum, 1982), 233-288; M. Whiteside and B. Becker, 'Parental Factors and the Young Child's Postdivorce Adjustment: A Meta-analysis with Implications for Parenting Arrangements' 2000 14 *Journal of Family Psychology* 5.

⁹³² S. Gilmore, 'Contact/Shared Residence and Child Well-being', 351.

treatment contrary to Article 14 in conjunction with Article 8.⁹³³ In particular, he emphasised that, at the material time, the relevant legislation allowed mothers to deny natural fathers any contact with their children born outside marriage.⁹³⁴ In justification of the contested domestic provision, the Government argued that, in the past, fathers of non-marital children had frequently demonstrated little or no interest whatsoever in establishing or maintaining family ties with their children.⁹³⁵ By reflecting a generalised reality, the contested provisions were not considered discriminatory at the material time. According to the same *ratio*, a subsequent reform of the Civil Code was grounded on recent changes in social attitudes.⁹³⁶

In the wake of the Chamber's judgment, the Grand Chamber observed that, at the material time, the German Civil Code provided different standards for divorced fathers of children born in wedlock and fathers of children born out of wedlock.⁹³⁷ Whilst the former group of fathers were legally entitled to contact, which could be restricted or suspended if necessary in the child's interest, the latter's contact with their children presupposed either the mother's consent or a court ruling establishing such contact in order to meet the child's best interests.⁹³⁸ However, because the examination of the Civil Code's provisions did not fall within the Court's competences, the issue to be determined was whether the application of German law in the present case entailed an unjustified differential treatment between the applicant and the case of divorced fathers. In this regard, the Grand Chamber found that:

Having regard to the fact that these courts were convinced of the applicant's responsible motives, his attachment to the child and his genuine affection for her, they placed a burden on him which was heavier than the one on divorced fathers.⁹³⁹

Having established the existence of differential treatment, the Court went on to decide whether it was justified. In this regard, it recalled that very weighty reasons needed to be put

⁹³³ The same argument was also advanced in the previous case of *Elsholz v Germany*. However, different from the present case, the Court found no violation of Article 14 taken in conjunction with Article 8. In its view, the German Court's decisions were grounded on the impact of contact against the will of the mother on the child's wellbeing and, therefore, it could not be concluded that a divorced father would have been treated more favourably.

⁹³⁴ *Sahin*, para 82.

⁹³⁵ *Ibid.*, para 83.

⁹³⁶ *Ibid.*

⁹³⁷ *Ibid.*, para 86.

⁹³⁸ *Ibid.*

⁹³⁹ *Ibid.*, para 92.

forward before differential treatment on the ground of birth out of or within wedlock could be considered compatible with the Convention.⁹⁴⁰ In the Court's view, the same held true for differential treatment of the father of a child born in a relationship where the parties were living together out of wedlock as compared with the father of a child born of a marriage-based relationship.⁹⁴¹ Since sufficiently weighty reasons could not be discerned in the present case, the Court held that there had been a violation of Article 14 in conjunction with Article 8.

When examining the complaint under Article 14, any significance of the margin of appreciation was ruled out because of the suspect grounds of discrimination under scrutiny and the employment of Article 14 as a “magnifying lens”.⁹⁴² As observed in Chapter 1, the suspect nature of the badge of differentiation is likely to trigger the application of the very weighty reasons test and, therefore, to subject the contested measure to strict scrutiny. Moreover, the finding of a breach of Article 14 taken into conjunction with Article 8 provides a good example of the reinterpreted scope of the ambit doctrine, as described by Arnardóttir. The Court considered the decision-making process of sufficient quality to ensure the protection of the applicant's interests and, accordingly, found no violation of Article 8. However, given that German law distinguished between fathers depending on whether their children were born within or outside wedlock, a violation of Article 14 taken in conjunction with Article 8 was found. Therefore, the discriminatory dimension of the case ultimately operated as an aggravating factor and, together with the suspect ground of discrimination, prevailed over the ‘better placed’ argument as the factor determining the outcome of the complaint.

Furthermore, this judgment sheds light on the tensions between the notion of ‘stereotype’ and generalised reality as well as between two different understandings of the role of the law as a tool for either fighting stereotypes or providing compensation for existing gender role differences. As previously stated, a stereotype can be defined as a “generalised view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular group”.⁹⁴³ It has been argued, and also verified, that stereotypes might reflect the realities that individuals actually encounter in their daily lives.⁹⁴⁴ However, to what extent a

⁹⁴⁰ *Ibid*, para 94.

⁹⁴¹ *Ibid*.

⁹⁴² Arnardóttir, ‘Discrimination as a magnifying lens’, 335.

⁹⁴³ Cook and Cusack, ‘Gender Stereotyping’, 9.

⁹⁴⁴ See, *inter alia*, E. Prothro and L. Melikian, ‘Studies in Stereotypes: V. Familiarity and the Kernel of Truth Hypothesis’ 1995 41 *Journal of Social Psychology*, 3-10.

generalisation describes the actual position of an individual is considered irrelevant for the purpose of classifying it as a stereotype.⁹⁴⁵ Whilst the generalisation might perfectly match the situation of an individual, the fact that no attention was directed to this individual's needs, wishes, abilities and circumstances makes it a stereotype.⁹⁴⁶

Having regard to the present case, it is worth recalling that the Government justified the provisions of the Civil Code as non-discriminatory on the basis that “in the past, fathers of children born out of wedlock had frequently shown no interest in their children”.⁹⁴⁷ In light of the definitions above, the considerations relied on by the Government represent a clear example of how stereotyping operates in the law-making process. Although possibly reflecting the behaviour of unmarried fathers at the material time, national courts have ascribed a certain attitude to the applicant by virtue of his gender and marital status. They have placed a certain pattern on him, regardless of how he acted towards the child when they lived together and, more generally, of his abilities and desires. The applicant was therefore judged on the basis of his group-membership and ties to a particular identity.⁹⁴⁸

Although not directly concerned with gender stereotypes, the judgment in *Sahin* displays some anti-stereotyping efforts. Indeed, in line with the approach envisaged by Timmer, it investigates the reasons put forward by the Government and dismisses any appeal to stereotypical and generalised views around unmarried fathers as insufficient grounds for differential treatment on the basis of marital status. More specifically, it was held that:

[T]he Court is not persuaded by the Government's arguments, which are based on general considerations that fathers of children born out of wedlock lack interest in contact with their children and might leave a non-marital relationship at any time. Such considerations did not apply in the applicant's case. He had in fact been living with the mother at the time of the child's birth in June 1988 and had maintained contact with her until October 1990. He had acknowledged paternity and undertaken to pay maintenance. More importantly, he had continued to show concrete interest in contact with her for sincere motives.”⁹⁴⁹

⁹⁴⁵ Cook and Cusack, ‘Gender Stereotyping’, 11.

⁹⁴⁶ *Ibid.*

⁹⁴⁷ *Sahin v Germany* (Grand Chamber), para 83.

⁹⁴⁸ Timmer, ‘Toward an Anti-Stereotyping Approach’, 715.

⁹⁴⁹ *Sahin v Germany* (Chamber), paras 58-59, referred to by the Grand Chamber, para 88.

Stereotyping had therefore resulted in subjecting the applicant to a test, which was stricter than the one applied to divorced fathers. By identifying a “structured set of beliefs about the personal attributes”⁹⁵⁰ of unmarried fathers, the Grand Chamber discards marriage as a determining factor in the allocation of contact rights to the advantage of a fact-based and nurture-oriented assessment of the applicant’s behaviour in relation to the child. In so doing, the majority’s outcome under Article 14 eventually gives voice to the concerns raised by Judges Rozakis and Tulkens in their partly dissenting opinion, although in relation to Article 8. In their opinion, the denial of contact was to be held incompatible with Article 8(2) because it pursued an illegitimate aim; namely, the protection of the “ceremonial aspect of family life” as opposed to the “real aspects which constitute the concept of family in a modern society”.⁹⁵¹ However, by approaching the issue of form over substance from the perspective of discrimination, the majority limits the relevance of its own findings to the situation of unmarried fathers *vis-à-vis* divorced fathers.

Traces of an anti-stereotyping approach can also be found in subsequent case-law dealing with the same legal question. To this end, it is sufficient to mention the Court’s judgment in the case of *Zaunegger v Germany*, where an unmarried father was denied joint custody of a child on the ground that the German Civil Code provides that a child born out of wedlock shall be in the sole custody of the mother unless the parents marry or make a declaration of joint custody.⁹⁵² It was acknowledged that the domestic courts’ decision and, accordingly, the contested legislation pursued a legitimate aim, namely the protection of the best interests of the child born out of wedlock. Due to the multiplicity of life situations into which non-marital children are born (ranging from cases where the identity of the biological father is not established to those where the father is fully engaged in his child’s development),⁹⁵³ the Court accepted that the primary attribution of

⁹⁵⁰ R. Ashmore and F. Del Boca, ‘Sex Stereotypes and Implicit Personal Theory: Towards a Cognitive-Social Psychological Conceptualization’ 1979 5 *Sex Roles* 222.

⁹⁵¹ *Sahin v Germany* (Grand Chamber), Partly Dissenting Opinion of Judge Rozakis joined by Judge Tulkens, para 4.

⁹⁵² Another remarkable example of an anti-stereotyping approach undertaken by the Court can be found in the case of *Schneider v Germany*, where the Court held that: “Having regard to the realities of family life in the 21st century, revealed, *inter alia*, in the context of its own comparative law research, (it) is not convinced that the best interests of children living with their legal father but having a different biological father can be truly determined by a general legal assumption. Consideration of what lie in the best interests of the child concerned is, however, of paramount importance in every case of this kind. Having regard to the great variety of family situations possibly concerned, the Court therefore considers that a fair balancing of the rights of all persons involved necessitates an examination of the particular circumstances of the case.” (para 100). The facts of the case will be briefly outlined later in this section.

⁹⁵³ *Zaunegger*, para 54.

parental authority to the mother – in the absence of a joint declaration – was justified to ensure the identification of a person at birth who could act as the legal representative of the child.⁹⁵⁴

Moreover, the Court was of the opinion that, in certain cases, there could be valid reasons for rejecting any participation of an unmarried father in parental authority; for instance, when hostility or the lack of communication between parents has the potential to disrupt the child's wellbeing.⁹⁵⁵ Nonetheless, it was argued that “nothing establishes that such an attitude is a general feature of the relationship between unmarried fathers and their children”.⁹⁵⁶ More explicitly, the Court could not accept the assumption that joint custody against the mother's will is *prima facie* not in the child's best interests.⁹⁵⁷

Having regard to the circumstances of the applicant – in particular, the early recognition of paternity, the fact that the applicant had lived with his daughter for more than five years and, after relationship breakdown with the mother, he had maintained regular contact – the above assumption appeared unsustainable in face of reality.⁹⁵⁸ Since the Government had failed to show why unmarried fathers were not entitled to judicial scrutiny of their request for custody, the Court concluded that there was not reasonable proportionality between the exclusion of judicial scrutiny of the mother's sole custody and the goal of protecting the child's best interests.⁹⁵⁹ As a result, a violation of Article 14, taken in conjunction with Article 8, was found.

Having observed a trend towards fighting stereotypes, it remains to be clarified whether the dismissal of marriage as a source of justified differentiation signals a full departure from the conventional paradigm or, rather, has merely created space for other conventional or quasi-conventional features. In order to clarify these points, references to some cases following the *Sahin* decision will be made. Firstly, throughout this case-law, the expansion of the notion of ‘family life’ reaches its peak. In the case of *Lebbink v the Netherlands*, an unmarried father was denied contact with his child born out of wedlock on the ground that, although he was present at birth and regularly visited the child, a close personal bond between them could not be found.⁹⁶⁰ When assessing whether the relationship between the applicant and his child could qualify as family life,

⁹⁵⁴ *Ibid*, para 55.

⁹⁵⁵ *Ibid*, para 56.

⁹⁵⁶ *Ibid*.

⁹⁵⁷ *Ibid*, para 59.

⁹⁵⁸ *Ibid*, paras 57-58.

⁹⁵⁹ *Ibid*, para 63.

⁹⁶⁰ *Lebbink v the Netherlands*, Application no. 45582/99, 1 June 2004.

the Court held that, when a “potential relationship which could develop between a child born out of wedlock and her natural father” is a stake, relevant factors demonstrating the existence of personal close ties encompass the nature of the relationship between the biological parents and the demonstrable interest in and commitment by the father to the child, before and after birth.⁹⁶¹

This definition of family life was adopted again in the cases of *Anayo v Germany* and *Schneider v Germany*, where the applicants were denied contact rights with respect to their (allegedly, only in *Schneider*) biological child, as they did not fall within the group of individuals who were entitled to contact under the Civil Code, namely the legal father or a person who has established a social and family relationship with the child. In both cases, the applicant had a relationship with a married woman and the child, who was born from that relationship, had lived with his/her mother and her husband, who was also the child’s legal father, since birth. Based on these facts, the Court argued that, in addition to *de facto* family ties, the intended family life might exceptionally fall within the ambit of Article 8, especially in cases where the failed establishment of family life is not attributable to the applicant.⁹⁶²

Apart from being considered relevant to establishing family life, these two elements have also been consistently relied on to conclude that stereotypical views were inapplicable to the applicants and, eventually, to find a violation. Concerning the mother-father relationship, emphasis has been frequently placed on the fact that childbirth or, at least, conception had occurred while the applicant and his former partner enjoyed a pseudo-marital relationship. However, it must be noted that, in neither of abovementioned cases, a pseudo-marital conception of fatherhood stands alone. Rather, the Court’s references to the nature and length of the mother-father relationship tends to be complemented with instances of nurture or, at least, nurturing intentions pertaining to the father’s direct relationship with his child.

The combination of these two elements can be found in *Sahin*, where stereotypical views are not applicable to the applicant (and a violation of Article 14 taken in conjunction with Article 8 was found) on the basis of his demonstrated interest in the child’s life after his break-up with his former partner, coupled with the fact that childbirth occurred while the applicant and his former

⁹⁶¹ *Ibid*, para 36. Having regard to the specific circumstances of the case, the Court placed emphasis on the following facts in order to conclude that family life existed – para 38. Actually, this was not the first time the Court adopted such wide definition of family life. Previous reference can be found in the case of *Nylund v Finland* (Application no. 27110/95, 29 June 1999), concerning the establishment of paternity of a child born in wedlock but from a non-marital relationship.

⁹⁶² *Lebbink*, para 81.

partner cohabitated.⁹⁶³ Another example is provided by the judgment in *Lebbink*, where the Court began by observing that the child was born from a “genuine relationship”⁹⁶⁴ that lasted for about three years and went on to discuss the existence of certain ties between the applicant and his child. In particular, it was observed that: “although the applicant never cohabited with Ms B. and Amber, he had been present when Amber was born, that – as from Amber’s birth until August 1996 when his relation with Amber’s mother ended – he visited Ms B. and Amber at unspecified regular intervals, that he changed Amber’s nappy a few times and baby-sat her once or twice, and that he had several contact with Ms B. about Amber’s impaired hearing.”⁹⁶⁵ In light of these considerations, the Court found family life to exist between the applicant and his child. Consequently, the decision of national courts to declare the applicant’s request inadmissible on the ground that no family ties could be established was consider in breach of Article 8.

Although the Court’s attention to the conduct of the father after childbirth is not unique to the judgment in *Lebbink*, different from the account of the father’s involvement in other cases, the Court goes beyond the emotional dimension to value physical care. In addition to underlining Mr Lebbink’s regular visits to the child, the Court mentioned that he had even changed A.’s diaper on a few occasions. In so doing, the Court may wish to emphasise the uniqueness of his involvement. Various studies on father involvement have cogently pointed out that, although the division of childcare between mothers and fathers has witnessed a certain quantitative redistribution, the kind of parenting activities undertaken by fathers is often gendered.⁹⁶⁶

Whilst fathers are more likely to participate in recreational and interactive activities, physical care of young children – such as bathing and changing a diaper – remains primarily the mother’s work.⁹⁶⁷ Therefore, Mr Lebbink constitutes an exceptional ‘new father’. By deriving commitment from occasional visits and physical childcare, the Court adheres to the ideology of

⁹⁶³ *Sahin*, para 59 (Chamber) referred to Grand Chamber, para 88.

⁹⁶⁴ *Ibid*, para 38.

⁹⁶⁵ *Ibid*, para 39.

⁹⁶⁶ A. Yoshida, ‘Dads Who Do Diapers: Factors Affecting Care of Young Children by Fathers’ 2012 33(4) *Journal of Family Issues* 452.

⁹⁶⁷ See, *inter alia*, T. Combs-Orme and L. Renkert, ‘Fathers and their infants: Caregiving and affection in the modern family’ 2009 19 *Journal of Human Behavior in the Social Environment* 394-418; L. Craig, ‘Does father care mean fathers share? A comparison of how much mothers and fathers in intact families spend time with their children’ 2006 20 *Gender and Society* 259-281; M. Lamb, *The Role of the Father in Child Development* (Wiley, 1997); B. McBride and G. Mills, ‘A comparison of mother and father involvement with their preschool age children’ 1993 8 *Early Childhood Research Quarterly* 457-477; M. Starrels, ‘Gender differences in parent-child relations’ 1994(5) *Journal of Family Issues* 148-165.

‘new fatherhood’ in a more comprehensive form: fathers are expected to provide not only greater emotional care, but also physical care. However, controversy remains as to the amount of care in order to meet the threshold and, more specifically, whether changing diapers and babysitting a child a few times can be considered sufficient to reach this threshold.

In the case of *Zaunegger v Germany*, the combination of the mother-father relationship with the father’s demonstrated commitment to his child proved decisive to dismiss the stereotypical image of unmarried fathers as generally uninterested in maintaining a tie with their children. In this case, the Court noted that the applicant had cohabitated with the mother and the child until the latter was three and a half years old.⁹⁶⁸ It was further observed that, after parental separation, the child continued to live with the father for more than two years;⁹⁶⁹ and, also after the child moved to the mother’s flat, the father continued to enjoy extensive contact with his daughter and to provide for her daily needs.⁹⁷⁰ As a result, the Court could not accept the assumption whereby joint custody against the will of the child’s mother is automatically detrimental to the child’s best interests.⁹⁷¹ Given that the Government had failed to advance sufficient reasons why the request of the applicant – who had been acknowledged as the child’s father and had behaved as such towards the child – should call for less judicial scrutiny than requests for joint custody submitted by divorced fathers, a violation of Article 14 taken in conjunction with Article 8 was found.⁹⁷²

Similarly, in the judgment of *Schneider v Germany*, the Court observed that, although the child’s biological parents never cohabitated, it was undeniable that they had a relationship which lasted for one year and four months and, therefore, was not considered merely haphazard.⁹⁷³ In addition to this, the Court emphasised the applicant’s demonstrated interest and commitment to the child by referring to the following pre-birth circumstances: at least according to Mr Schneider’s account, the couple had planned to have a child together; he had accompanied Mrs H. to medical examinations related to her pregnancy and had acknowledged paternity.⁹⁷⁴ After his son’s birth,

⁹⁶⁸ *Zaunegger*, para 39.

⁹⁶⁹ *Ibid.*

⁹⁷⁰ *Ibid.*

⁹⁷¹ *Ibid.*, para 59.

⁹⁷² *Ibid.*, paras 61-62.

⁹⁷³ *Schneider*, para 88. All the remarks concerning the judgment in *Schneider* can be automatically extended to the judgment in *Anayo v Germany* (Application no. 20578/07, 21 December 2010) which dealt with the exact same question and was decided a year later.

⁹⁷⁴ *Schneider*, para 89.

he had initiated proceedings to obtain contact and information concerning the child's development "relatively speedily", namely in less than six months after the child's birth.⁹⁷⁵ Given the legal parents' opposition, the Court concluded that the applicant had sufficiently demonstrated his interest in his son.⁹⁷⁶ Against this background and, more generally, the family realities of the 21st century, the Court was no longer convinced that the best interests of a child living with his legal father but having a different biological father could be accurately established by a general legal assumption.⁹⁷⁷ Considering that national authorities did not take into consideration whether, in the specific case, contact between the father and his child would be in the latter's best interests, a violation of Article 8 was found.

As a result, in all cases, fatherhood is constructed as derivative of both the mother-father relationship and nurture or, in the case of *Schneider*, nurturing intentions. Given the increased importance attached to nurture/nurturing intentions, it follows that the existence of a biological connection between the father and his child born out of wedlock is not sufficient to trigger the existence of family life between them. The insufficiency of biology was expressly stated in the case of *Lebbink*. More specifically, it was held that:

The Court does not agree with the applicant that a mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship, should be regarded as sufficient to attract the protection of Article 8.⁹⁷⁸

Apart from being held insufficient, the existence of a biological link was denied any relevance in the case of *Schneider v Germany*. Indeed, it must be noted that, different from the other applicants, the paternity of the child had not been established by national courts and the mother claimed that Mr Schneider could have been the child's biological father as much as the mother's husband (legal father of the child). Given that the Court held that national authorities had to assess, rather than presume, the compatibility between granting contact rights to the applicant and the child's best interests, regardless of the uncertainty as to the paternity of the child, it seems possible to conclude that, in the Court's view, a potential lack of biological link should not make

⁹⁷⁵ *Ibid.*

⁹⁷⁶ *Ibid.*

⁹⁷⁷ *Ibid.*, para 100.

⁹⁷⁸ *Lebbink*, para 37.

an unmarried father's request for contact *a priori* unworthy of consideration. Hence, biological relatedness appears superfluous for an unmarried father's request for contact rights to be considered, and eventually, accepted.

Despite the identified trends, it is worth noting that the outcome of *Sahin* is, however, not completely in line with subsequent cases. While a violation of Article 14 taken in conjunction with Article 8 is also found in the case of *Zaunegger*, the non-finding of a violation of Article 8 remains exceptional to the judgment in *Sahin*. Indeed, in both *Lebbink* and *Schneider*, the Court found the inability for an unmarried father to obtain contact rights without the mother's consent was in violation of his right to respect for family life. This difference in outcome might depend on, *inter alia*, the roles played by the margin of appreciation and by the interpretation of the Convention as a living instrument as well as their interplay. While in the *Sahin* case, as previously explained, the Court's reliance on the doctrine seems to have facilitated the finding of a non-violation of Article 8 by lowering the standard of review, in the case of *Lebbink*, the doctrine was not even mentioned and, curiously, a violation of Article 8 was found even if, compared to Mr Sahin, Mr Lebbink had never cohabitated with either A. or his mother.

In the case of *Zaunegger*, the doctrine of the margin of appreciation makes a reappearance. However, different from the case of *Sahin* (concerning a complaint under Article 8), the doctrine did not stand in the way of finding a violation. The Court held that, despite the lack of consensus as to whether unmarried fathers have a right to apply for joint custody without the mother's consent, most Contracting States appear to share a common point of departure when making custody determinations, namely the best interests of the child.⁹⁷⁹ Moreover, it was noted that, in case of tensions between the parents, the majority of national legislations provided that such decisions should be subject to the scrutiny of national courts.⁹⁸⁰ In this instance, therefore, the rule of consensus – although in a limited version – served to limit the typically wide margin of appreciation enjoyed by States when settling custody matters. Apart from relying on the existence of a common point of departure, the finding of a violation was greatly facilitated by a dynamic interpretation of the Convention. The Court explicitly recalled that the Convention shall be

⁹⁷⁹ *Zaunegger*, para 60.

⁹⁸⁰ *Ibid.*

interpreted as a living instrument and, in this case, regard had to be given to the evolving European family realities and the increasing proportion of unmarried parents.⁹⁸¹

A dynamic interpretation of the Convention is also advanced in the case of *Schneider*, where the Court held that “having regard to the realities of family life in the 21st century”, it was not persuaded that the best interests of the child living with his legal father but having a different biological father could be determined by a legal assumption. By finding a violation of the applicant’s rights under Article 8, the need – manifested in the case of *J.R.M v the Netherlands* – to afford absolute protection to the nuclear/legal family from the incursions of third parties faded. In turn, the end of the sanctity of the legal/bi-parental family signals the Court’s awareness of the on-going fragmentation of fatherhood and, accordingly, its openness to accepting multiple father figures, either concomitant or successive.⁹⁸² In so doing, the Court overcomes the assumption of exclusivity – which strongly characterises its jurisprudence on ART – according to which each child can have only one real father.⁹⁸³

Therefore, it seems possible to observe that, whenever the reliance on the doctrine of the margin of appreciation avoids impacting the standard of review, the Court will find a violation. A stricter scrutiny, in turn, appears to be facilitated by at least three variables: the existence of a suspect discriminatory ground and the employment of Article 14 as a “magnifying lens” (*Sahin* concerned a complaint under Article 14 taken in conjunction with Article 8), the existence of a European consensus and, related to this, the Court’s undertaking to advance a dynamic interpretation of the Convention provision (*Zaunegger* and *Schneider*). Therefore, while in the case of *Sahin*, the adoption of an anti-stereotyping approach stemmed from the categorisation of sex as a suspect ground which entails the application of the ‘weighty reasons test’, coupled with the magnifying effects of Article 14, in the following two cases, the Court felt ready to contest

⁹⁸¹ *Ibid.*

⁹⁸² Whilst sociological and psychological evidence has sometimes underlined the benefits deriving from multi-parenting on the child’s wellbeing, the legal acceptance of this arrangement might give rise to less smooth scenarios. On the one hand, it might be argued that the presence of more rather than fewer parents is likely to promote the child’s best interests. Assuming that parents play a positive role in their children’s life, the greater their number the greater protection, care and financial support is provided to children. On the other hand, however, it has been repeatedly underlined that conferring parental status and rights to more than two parents is likely to increase the chances of tension between the adults concerned. Children being the focus of parental disputes, the latter might harm the child’s best interests. See, J. Masson, ‘Parenting by Being; Parenting by Doing – In Search of Principles for Founding Families’ in A. Pedain and J. Spenser (eds.), *Freedom and Responsibility in Reproductive Choices* (Hart, 2006), 135; C. Smart, ‘Children and the Transformation of Family Law’ in J. Dewar and S. Parker (eds.), *Family Law: Processes, Practices and Pressures* (Hart, 2003), 223.

⁹⁸³ Sheldon, ‘Fragmenting Fatherhood: The Regulation of ART’, 550.

general legal presumptions employed by national courts, when faced by changed realities of family life – in particular, an increasing proportion of unmarried parents – and by a certain consensus among legal systems. Thus, at least in *Zaunegger* and *Schneider*, the Court seems to employ the law as an instrument that mirrors social change and national legal approaches, more than attempting to transform present realities.

Although the methodology employed by the Court to establish consensus is not of direct interest to the present work, a couple of observations might be useful to show how the Court's explicit reference to the existence, or non-existence, of a common ground do not always translate into an effective reliance on consensus, which are due to methodological inconsistencies. Indeed, a more attentive look at the establishment of consensus in the cases of *Zaunegger* and *Schneider* can reveal that, more than reflecting present-day conditions, the Court's interpretation of Article 8 attempted to establish new conditions. In the case of *Zaunegger*, the countries included in the survey on comparative law are not mentioned. Thus, when the judgment speaks of the 'majority', it is unclear to what extent the common approach actually reflects a majoritarian position within the Council of Europe. Moreover, as acknowledged by the Court itself, only a limited group of countries provide an explicit response to the issue of a lack of agreement between the parents. Therefore, as pointed out by the dissenting Judge Schmitt, whilst the majority of Contracting States might allow for judicial scrutiny in cases concerning a tension between unmarried parents, the existing legal provisions and, more generally, the underlying legal approaches are not similar in their details. It follows that, as expressly stated by the Court, the survey of comparative law merely identified a common point of departure rather than a common legal solution eventually adopted in the event of a conflict between the parents.

Similarly, in the case of *Schneider*, the Court appears to derive its perception of present-day family realities from its own comparative research, which is included in paragraphs 38-46 of the judgment. This study concerned 23 Member States of the Council of Europe and, as its primary finding, indicated the absence of a uniform approach to the issue whether and, if so, under what circumstances, a biological father has a right of contact with his child, provided that a different man was recognised as legal father. Without providing any precise number or proportion of States, the Court identified three different existing legal responses: the biological father can obtain contact rights by challenging the paternity presumption; the biological father has no standing to challenge that presumption and can only apply for contact as a third party, not as a parent; and the law

reserves a right to contact only to legal parents and other relatives and, therefore, the biological father lacks standing to apply for contact rights also as a third party.

As illustrated in the introductory chapter, the absence of a shared approach is usually conducive to a wide margin of appreciation, as opposed to a dynamic interpretation of the Convention. In light of the divergent answers provided by Contracting States, it therefore appears surprising that no decisive role was conferred on the doctrine of the margin of appreciation in settling these two cases. Whilst the Court pursues the laudable aim of ensuring the protection of the rights of unmarried parents as a growing category of parents in present-day families, its *ratio decidendi* lacks consistency or, at best, employs the doctrine of the Convention as a living instrument as a tool for judicial activism, thus giving rise to obvious legitimacy concerns.

This section concludes with a final remark on the Court's appreciation of the interests of all parties involved. Firstly, the mothers' reasons for opposing contact are never considered. Not even implicitly, the Court seems to express the idea that the mother has a right to move on with her life and, since she takes care of the children, to do so without undue interference by the child's biological father. Not even in the case of *Lebbink*, where the child's mother had complained of the applicant's violent behaviour toward the child. In this case, moreover, the Court approaches the issue of contact exclusively from the father's perspective, thus ignoring the child's best interests. Differently, in the other three cases, the best interests of the child are consistently referred to as a paramount consideration in settling cases concerning the relationship between a biological parent and his/her child.

However, it remains to be established whether the child's interests have been given adequate consideration. As mentioned above, in the case of *Sahin*, the Court accepts the assessment of the child's best interests conducted by national authorities in light of their closer contact to the parties involved.⁹⁸⁴ However, this attitude of deference might have given space to the stereotypical belief that contact against the will of the mother of a child born out of wedlock runs counter the child's best interests; therefore, an overlap between the child's interests and the mother's opposition to contact might have been assumed in the end. Differently, in the judgments of *Zaunegger* and *Schneider*, the Court attempts to extricate the principle of the best interests of the

⁹⁸⁴ Indeed, it must be noted that the anti-stereotyping approach undertaken by the Court impacts on the national authorities' assumption of the applicant's lack of interest in his child born out of wedlock, but not on their assessment of the child's best interests.

child from general principles and underlying ideologies. In so doing, it proposes an investigation of the child's best interests that is grounded on the specific circumstances of the case.⁹⁸⁵

Obviously, the need to assess the child's best interests on grounds of individual cases goes hand-in-hand with the need to conduct a case-by-case evaluation of the father's interest and commitment. In turn, an increased importance attached to serious nurturing intentions is closely connected to the progressive abandoning of gender stereotypes related to parenthood, to which national authorities are invited to participate by the Court. Overall, the Court seems to accept that a man can actually seriously want to become a father (regardless of the relationship with the mother) and that an unmarried father can be as committed as a married/divorced father or an unmarried mother.

Nonetheless, as previously noted, when looking for evidence of the father's interest and commitment, the Court does not ground its evaluation solely on the applicant's behaviour towards the child, but also on the nature of the relationship from which the child was born. In so doing, the Court seems to rely on a presumption connecting casual sex with irresponsible fatherhood and sexual relations, which took place in the context of a more-stable/committed relationship and responsible fatherhood. The Court must be aware that contact and custody disputes are sometimes about instrumentalising children to assert control over their mothers. Thus, the Court's persisting attachment to marital fatherhood, although in a revisited form, might simply be the response to its own need to identify a way of testing true commitment and reliability in the future.

2.1.2 Secret Placement for Adoption without the Consent of the Biological Father

This sub-section analyses the Court's position with respect to those cases whether the child born out of wedlock was placed for adoption, without the knowledge and consent of the biological father. In order to do so, the focus will be placed on four judgments, whose sequence displays a heightened importance attached to the father's demonstrated interest and commitment to his child born out of wedlock. This trend is accompanied by a decreased explicit emphasis on the mother-father relationship as a relevant factor to establishing family life and to finding a violation. However, a more in-depth investigation of the Court's reasoning seems to point to a different

⁹⁸⁵ *Zaunegger*, paras 57-8-9. In the case of *Schneider*, para 100: "[T]he Court is not convinced that the best interests of children living with their legal father but having a different biological father can be truly determined by a general legal assumption. (...) The Court therefore considers that a fair balancing of the rights of all persons involved necessitates an examination of the particular circumstances of the case".

direction by showing a link between the presence of a stable and committed relationship from which the child was born and the analysis of the applicant's claim from the perspective of the State's positive obligations arising out of Article 8.

In the case of *Keegan v Ireland*,⁹⁸⁶ the applicant and his girlfriend (V.) cohabitated from February 1987 until February 1988. In December 1987, they decided to have a child and, subsequently, they got engaged. In February 1988, V.'s pregnancy was confirmed. However, shortly after this, the couple split up. Nonetheless, the applicant visited V. at a private clinic and saw the new-born baby when she was one-day old. Two weeks after childbirth, the applicant went to V.'s parents' home but he was not allowed to see either V. or the child. Eventually, a registered adoption agency placed the child with an adoptive family, in compliance with agreements made by the mother during her pregnancy.

The applicant instituted proceedings before the Circuit Court to be appointed guardian in order to be able to oppose the proposed adoption. He also applied for custody rights. Both his requests were accepted by the Circuit Court. The mother and the prospective adopters appealed to the High Court. The latter found that the applicant was fit to be appointed guardian and that there were no circumstances involving the welfare of the child requiring a refusal. However, after the High Court proceedings, the case was referred to the Supreme Court, upon the application of V. and the prospective adoptive parents. This court held, *inter alia*, that a natural father did not have an automatic right to be guardian but only a right to apply for guardianship. The first and paramount consideration in the exercise of judicial discretion was the welfare of the child.

The High Court resumed examination of the case in the light of the Supreme Court's ruling and concluded that the applicant's request for guardianship and custody should be dismissed because, with the additional passage of time, the child's attachment to the prospective adopters had grown stronger and, therefore, the danger of psychological trauma should the child be moved would be greater. An adoption order was eventually made in respect of the child. Having exhausted all domestic remedies, Mr Keegan lodged an application with the Commission and argued that the secret placement of his daughter for adoption, without his knowledge or consent, violated his right to respect for family life. The case was considered admissible and referred to the Court.

The Government submitted that the "sporadic and unstable" relationship between Mr Keegan and the mother of child did not possess the "minimal levels of seriousness, depth and

⁹⁸⁶ *Keegan v Ireland*, Application no. 16969/90, 26 May 1994.

commitment” to qualify as ‘family life’ within the meaning of Article 8.⁹⁸⁷ The Court recalled that the notion of ‘family life’ applies beyond marriage-based relationships and might include other *de facto* relationships where the partners live together outside of marriage.⁹⁸⁸ It was also reiterated that a child born out of that relationship was *ipso jure* part of that relationship from the moment and by the very fact of birth. Moreover, irrespective of whether the parents cease to live together, once family life between a child and his/her parent has been established, this will remain over time.⁹⁸⁹

Therefore, contrary to the Government’s arguments, the Court concluded that the relationship in question had “the hallmark” of family life, as interpreted under Article 8, and family life existed also between the applicant and his daughter since and by virtue of her birth.⁹⁹⁰ Therefore, the father-daughter relationship was constructed as a derivative of the interparental relationship. More specifically, in the Court’s assessment, emphasis was placed on the fact that the relationship between the applicant and his girlfriend had lasted two years, one of which entailed cohabitation.⁹⁹¹ It was also noted that the birth of the child was the product of a deliberate decision and that the couple had also planned to formalise their relationship through marriage.⁹⁹²

Moreover, the Court reiterated that (as established in the case of *Marckx v Belgium*) once the existence of a family bond is found, Article 8 requires the State “to act in a manner calculated to enable that tie to be developed” as well as to introduce “legal safeguards (...) that renders possible as from the moment of birth the child’s integration in his family”.⁹⁹³ The Court was, therefore, of the opinion that the fact that Irish law enabled the secret placement of the child without the applicant’s knowledge or consent and the consequential attachment of the child to the adopters amounted to an interference with the applicant’s right to respect for family life.⁹⁹⁴

When assessing the compatibility of the interference with Article 8(2), the Court accepted that the decision to place the child for adoption was in accordance with Irish law and pursued a legitimate aim, namely the protection of the rights and freedoms of the child.⁹⁹⁵ However, it

⁹⁸⁷ *Ibid*, para 42.

⁹⁸⁸ *Ibid*, para 44.

⁹⁸⁹ *Ibid*.

⁹⁹⁰ *Ibid*.

⁹⁹¹ *Ibid*, para 45.

⁹⁹² *Ibid*.

⁹⁹³ *Marckx v Belgium*, para 31.

⁹⁹⁴ *Ibid*, para 51.

⁹⁹⁵ *Keegan*, para 53.

concluded that the child's placement was not necessary in a democratic society because the Government had failed to provide reasons related to the welfare of the child to justify its departure from the positive obligations of respect arising from Article 8.⁹⁹⁶ To substantiate its ruling, the Court observed that the placement of a child with alternative carers had potentially irreversible consequences. By leading to the establishment of new ties, it compromised the nurturing of a bond between the natural father and the child and it gave rise to a process which placed the biological father at a disadvantage, *vis-à-vis* the prospective adopters, with respect to the custody of the child.⁹⁹⁷ For these reasons, the Court unanimously held that there had been a violation of Article 8.

The first analytical remark is of larger applicability and, in a certain way, contributes to explaining and justifying the structure and the axis of the present analysis. By stating that the relationship between the applicant and his ex-girlfriend “had the hallmark of family life”,⁹⁹⁸ the Court acknowledges that its analysis is developed against the background of a particular notion of ‘family life’, which presupposes the existence of a set of specific conditions. Accordingly, this ideal model of the family works as a parameter against which the existence of family life in unconventional scenarios and, more importantly, the legitimacy of the applicants’ claims are assessed. This seems to suggest the existence of a rule, according to which the father’s complaint is considered to fall within the notion of family life depending on the existence of a marriage-like relationship between the applicant and the child’s mother at the time of conception.

Having regard to the present case, the factors which were held relevant to determine the establishment of family life between Mr Keegan and his ex-girlfriend and, consequently, with his child pertain exclusively to the interparental relationship.⁹⁹⁹ In line with the judgment in the case

⁹⁹⁶ *Ibid*, para 55. The emphasis on positive obligations arising out of Article 8 played a decisive role in finding a violation also in the case of *Görgülü v Germany*, Application no. 74969/01, Judgment of 26 May 2004. Like in *Keegan*, the mother placed the child for adoption, immediately following childbirth. The biological father attempted to gain custody and contact rights, but unsuccessfully. When assessing the applicant’s claim, the Court noted the potential relevance of the lack of cohabitation between the applicant and Christofer in striking a balance between the competing rights and interests of the foster parents, the applicant and the child (para 45). Nonetheless, it also recalled that the effective respect for family life required the State to act in a manner which enabled the development of the tie in question and, accordingly, to facilitate the reunification of a natural father with his child (para 45). It followed that, having regard to the present case, effective respect also entailed the State’s obligation to prevent future relations between a father and his child from being compromised by the mere passage of time (para 45). As a result, a violation of Article 8 was found.

⁹⁹⁷ *Keegan*, para 55.

⁹⁹⁸ *Ibid*, para 45.

⁹⁹⁹ Although not involving an unmarried father opposing adoption, it seems interesting to mention that the sufficiency of the mother-father relationship to find family life was established even more explicitly in the judgment of *Kroon*

of *X, Y and Z v UK*, the Court placed emphasis on three key elements: the length – two years – and the nature of their relationship – that included a period of cohabitation of one year – as well as the couple’s intention to have a child and get married. Therefore, in this case, the existence of a marriage-like relationship sufficed to establish the existence of family life between the applicant and his daughter and, consequently, to impose a positive duty to enable the development of that ties on the State. The Court did not even attempt to build on the facts that were already known to demonstrate the applicant’s willingness to raise his daughter. For instance, it could have been argued that, by keeping contact with the mother, by visiting her and the new-born child when she was one day old, and by having to resort to initiating custody proceedings, he had shown a genuine interest in establishing a bond with his child.

As a result, his family life with the child is considered not to develop autonomously; but rather, it is portrayed as a total derivative of and mediated by his relationship with the mother. Hence, the Court seems to remain attached to a pseudo-marital conception of fatherhood, which presupposes childbirth in the context of a stable and committed relationship and, accordingly, identifies a father more as the partner of the mother. The primary focus on the father-mother relationship (even if the existence of family life between them is extended (*ipso jure*) to the father-child tie) is possibly due to the fact that, similar to the cases concerning the employment of ART, the applicant had not had the chance to transform his caring intentions into reality. Therefore, the sole existing situation that was capable of being assessed remained the relationship between the two adults.

Nonetheless, it seems important to note that the national authorities’ decision to place the child for adoption regardless of Mr Keegan’s consent ultimately did not satisfy the proportionality test due to the lack of justifications pertaining to the welfare of the child on the part of the Government. Therefore, whilst a certain degree of resemblance with marriage is sufficient to reach the threshold of family life, the allocation of residence rights must follow from an assessment of the best interests of the child. In accordance with its own jurisprudence, the Court reserves a

and Others v the Netherlands, Application no. 18535/31, 27 October 1994. In this case, the applicants – the mother (Mrs Kroon), the biological father (Mr Zerrouk) and the child (Samir) – were unable to obtain recognition of the second applicant's paternity of the third applicant due to the presumption of paternity existing under Dutch legislation in favour of the husband of the mother at the time of registration of the birth. The Court observed that, since 1987, four children had born out of the relationship between the applicant and Mrs Kroon; “thus, there exists between Samir and Mr Zerrouk a bond amounting to family life, whatever the contribution of the latter to his son’s care and upbringing” (para 30).

particularly prominent role to the child's best interests in a case – like the present – which involves decisions affecting the child's upbringing.

However, although not explicitly stated, the Court seems to adhere to a specific view of the best interests of the child: the biological tie between an unmarried father and his child should be protected against irreversible processes that place the natural father in a disadvantaged position *vis-à-vis* that of prospective adopters with respect to the custody of the child (like in the cases of *Mennesson* and *Labassee*).¹⁰⁰⁰ Hence, biology seems to be constructed as naturally closer to the child's best interests. The weight attached to the biological connection emerges even more clearly in the following case, whose facts resemble those of *Keegan*. In the case of *Görgülü v Germany*,¹⁰⁰¹ the child (Christofer) had been placed with a foster family and, according to the national courts, transferring the custody or granting contact rights to the applicant would have been detrimental to the child's wellbeing in light of his deep social and emotional ties with the foster family.

The applicability of Article 8 was almost assumed. The Court did no more than observe that the parties agreed that the decision not to grant contact and residence rights to the applicant amounted to an interference with his right to respect for family life.¹⁰⁰² When assessing whether this interference was justified under Article 8(2), the Court noted the potential relevance of the lack of cohabitation between the applicant and Christofer in striking a balance between the competing rights and interests of the foster parents, the applicant and the child.¹⁰⁰³ Nonetheless, as in *Keegan*, it also recalled that effective respect for family life required the State to act in a manner which enabled the development of the tie in question and, accordingly, to facilitate the reunification of a natural father with his child.¹⁰⁰⁴ It followed that, in this specific context, effective respect also entailed the State's obligation to prevent future relations between a father and his child from being compromised by the passage of time. Therefore, although acknowledging that separating Christofer from his foster family would have had negative repercussions on his mental

¹⁰⁰⁰ *Ibid*, para 55.

¹⁰⁰¹ *Görgülü v Germany*, Application no. 74969/01, 26 May 2004.

¹⁰⁰² *Ibid*, para 35.

¹⁰⁰³ *Ibid*, para 45. Indeed, in this case, the mother-father relationship ended before childbirth. More specifically, the applicant and the child's mother met in 1997. The following year, they had planned to get married but she cancelled the wedding. Despite that, they remained together until the beginning of 1999. Few months later, he found out about her pregnancy and, at least according to him, the couple agreed that he would have taken care of the child. He sought information about her and the unborn child on a weekly basis until July 1999, since that time he was unable to get hold of her.

¹⁰⁰⁴ *Ibid*.

and physical wellbeing in the short-term, the ECtHR found a violation of Article 8 on the following basis:

[B]earing in mind that the applicant is Christofer's biological parent and undisputedly willing and able to care for him, the Court is not convinced that the Naumburg Court of Appeal examined all possible solutions to the problem. [...] The Court recalls in this respect that the possibilities of reunification will be progressively diminished and eventually destroyed if the biological father and the child are not allowed to meet each other at all, or only so rarely that no natural bonding between them is likely to occur.¹⁰⁰⁵

Both judgments in the cases of *Keegan* and *Görgülü* seem to suggest that biology is relevant but not necessarily sufficient. While in *Keegan*, the biological link was accompanied by the interparental relationship (two-year long cohabitation, deliberate decision to have a child and intention to get married), in *Görgülü*, no emphasis was placed on the father-mother relationship but, rather, biology was presented in conjunction with the applicant's nurturing intentions and potential.¹⁰⁰⁶ Indeed, given the lack of any previous contact between the applicant and his child, the Court could not rely on concrete instances of nurture.

At least *prima facie*, in the case-law following *Keegan*, any emphasis on the interparental relationship seems to give way to an increased attention to the father-child relationship. Indeed, even before *Görgülü*, the Court had embarked on a nurture-oriented investigation of the circumstances of the applicant in the judgment of *Söderbäck v Sweden*.¹⁰⁰⁷ The latter includes a more detailed factual account of the relationship of the father and his non-marital child and, possibly thanks to this, also the *ratio decidendi* hinges more upon the applicant's personal situation. Mr Söderbäck's situation and concerns resemble those of Mr Keegan. He met K.W. in 1980 and, two years later, she gave birth to a daughter (M.), of whom the applicant was the father. Different from Mr Keegan and V., "they were friends but did not have a steady relationship".¹⁰⁰⁸ At childbirth, the applicant visited K.W. and the child at the maternity ward once. Subsequently,

¹⁰⁰⁵ *Ibid*, para 46.

¹⁰⁰⁶ *Ibid*.

¹⁰⁰⁷ *Söderbäck v Sweden*, Application no. 24484/94, 28 October 1998.

¹⁰⁰⁸ *Ibid*, para 7.

he met M. twice at her mother's house. In addition, he attended her daughter's christening and, during spring 1983, he once babysat M. for approximately an hour.

K.W. reported to the Social Council that the applicant had alcohol-related problems and, therefore, she deemed it inappropriate for him to meet with the child, unless he was sober. In response to this, Mr Söderbäck explained that he had been unable to arrange further contact with his daughter child primarily due to difficulties in his job. He also admitted that he had problems with alcohol. However, according to his account, those had been overcome when he met A.H. in 1984. They started living together in 1985. In the meantime, K.W. had also met and begun to cohabitate with another man (M.W.). They eventually married in 1989.

The applicant had contact with his daughter on one occasion in 1984. He maintained that he wished to visit her more frequently but the mother impeded further contact. However, between 1984 and 1986, Mr Söderbäck had the chance to periodically see M., since the child-minder of A.H.'s son lived close to M.'s. Subsequently, they met on the occasion of the birthday party of A.H.'s son, which was also attended by M. Due to K.W.'s opposition to contact, the applicant asked the social welfare office for assistance. A couple of meetings between Mr Söderbäck and K.W. took place in the presence of a social worker; the mother reiterated her disagreement over allowing him to see the child and, in vain, he kept contacting the authority once every other month.

In 1988, the husband of K.W., M.W., applied to the District Court for permission to adopt M. The applicant opposed this request and applied to the same court for contact rights. The District Court decided to authorise M.'s adoption by M.W. due to his constant presence as a nurturing father in the child's life, since she was eight months old. Against this, the District Court held that in light of the occasional contact between the applicant and M. (which eventually stopped), "M. cannot be considered to have such a need of contact with the applicant as to constitute an impediment to adoption".¹⁰⁰⁹ This decision was upheld by the Court of Appeal and, subsequently, the Supreme Court refused leave to appeal.

Before the ECtHR, the applicant claimed that the Swedish authorities' decision to authorise M.'s adoption by her mother's husband, without his consent, had given rise to a violation of his right to respect for family life, as guaranteed by Article 8.¹⁰¹⁰ The Court did not conduct a proper assessment of whether family life existed; rather, the Court did no more than observing that, at the

¹⁰⁰⁹ *Ibid*, para 14.

¹⁰¹⁰ *Ibid*, para 18.

time of adoption, the existence of certain ties between the applicant and M. was undisputed.¹⁰¹¹ In light of this and, given the fact that the arguments' parties were concerned with the issue of compliance with Article 8, the Court went on to consider the case through the lens of family life. It was concluded that, having regard to the assessment of the best interests of the child undertaken by national courts as well as to the limited contact between the child and her biological father, the contested decision fell within the margin of appreciation of the respondent State and, accordingly, did not breach Article 8.¹⁰¹²

The Court began by establishing that the national court's decision to grant adoption was in accordance with the law and pursued the legitimate aim of protecting the rights and freedoms of the child.¹⁰¹³ In reaching its final decision on whether the adoption was necessary in a democratic society, the Court relied on a careful examination of the facts through the lens of nurture/care. In particular, it noted that the encounters that the applicant had with his daughter were "infrequent and limited in character",¹⁰¹⁴ and that, at the time of adoption, he had not met her for some time. Besides these factors giving rise to the mother's opposition, this situation was also due to the applicant's own problems.¹⁰¹⁵ Although he allegedly overcame his personal issues by the end of 1984, the Court observed that he waited almost three years (in June 1987, when the child was four years and nine months) before seeking the assistance of the social welfare office to arrange contact.¹⁰¹⁶

By placing emphasis on these circumstances, the Court aimed to point out that the biological father had not been as prompt and proactive as possible. This shortcoming was rendered even more worthy of consideration if compared to the situation of the M.W. and his relationship with M. In this regard, the Court underlined that the child had been living with her mother since birth and with her mother's husband since she was eight months old.¹⁰¹⁷ Therefore, M.W. had undertaken childcare responsibilities towards M. and the latter recognised M.W. as her own father.¹⁰¹⁸ Therefore, by the time the adoption order was made, *de facto* family bonds had tied K.W. and M.W. for five and a half years, before they married in 1989, and M.W. and M. for six

¹⁰¹¹ *Ibid*, para 24.

¹⁰¹² *Ibid*, para 34.

¹⁰¹³ *Ibid*, para 26.

¹⁰¹⁴ *Ibid*, para 32.

¹⁰¹⁵ *Ibid*.

¹⁰¹⁶ *Ibid*.

¹⁰¹⁷ *Ibid*, para 33.

¹⁰¹⁸ *Ibid*.

and a half years.¹⁰¹⁹ Given this state of affairs, the adoption order merely “consolidated and formalised” a pre-existing relationship.¹⁰²⁰

In ordering the adoption, the national court had taken into consideration not only the evidence provided by the Social Council, according to which adoption was in the child’s best interests, but also the submissions made by the applicant and M.W. at the hearing.¹⁰²¹ Hence, the Court deemed domestic courts were placed in a better position than a supranational court to strike a balance between the competing interests at stake.¹⁰²² Having regard to the evaluation of the best interests of the child made by the national authorities and the limited contact between the applicant and M., the Court concluded that the decision to grant adoption to M. did not exceed the margin of appreciation enjoyed by the State.¹⁰²³ Hence, no violation of Article 8 was found.

What does this judgment show? At least two relevant points can be made. The circumstances of the case replicate the classical scenario of multiple and successive parenting as a result of family breakdown. The main tension involved the biological father of a child born out of wedlock and the husband of the child’s mother who acts as a social father towards the child. Leaving the reasoning temporarily aside, the mere fact that the Court places the applicant in comparison with the social father of the child is *prima facie* indicative of a certain reluctance to introduce a father figure outside the social family unit where the child has been raised and, as such, represents a resistance on the part of the Court against the reality of fragmented fatherhood. In other words, the Court’s preoccupation appears to be more about who to choose between the two father figures, rather than how to combine and regulate their coexistence. However, the final outcome is clearly a statement of acceptance of the reality of fragmented fatherhood. Put differently, by concluding that granting the adoption of the child to the mother’s husband did not breach the applicant’s right to respect for family life, the Court acknowledges that biology, on the one hand, and nurture and marriage, on the other hand, are not always provided by the same individual. Hence, someone can become a child’s legal father (in this case, through adoption), even if the biological heritage of the child comes from a different man.

¹⁰¹⁹ *Ibid.*

¹⁰²⁰ *Ibid.*

¹⁰²¹ *Ibid.*

¹⁰²² *Ibid.*

¹⁰²³ *Ibid.*, para 34.

Secondly, different from the case of *Keegan*, the Court did not remark on the nature of the relationship from which M. was born. It focused instead on Mr Söderbäck as an individual. This might be attributable to the fact that, different from Mr Keegan and V., the biological parents of the child in the present case were, at least according to the facts included in the judgment, simply friends and never had a steady relationship.¹⁰²⁴ Similarly, when considering the relationship between M. and his social father, M.W.'s parenting skills and suitability seemed to have been equally evaluated on an individual basis. The Court noted that "the child had been living with her mother since her birth and with her adoptive father since she was eight months old; he had taken part in the care of M., who regarded him as her father".¹⁰²⁵ That said, however, it cannot be excluded that the adoptive father's eventual victory over the applicant was facilitated by the wider 'family package' that he had to offer; in other words, the specific environment where M. was raised amounted to a marital family.

The Court's emphasis on nurture is further confirmed by the judgment in *K.A.B. v Spain*, but in a milder form.¹⁰²⁶ The applicant was a Nigerian national who migrated to Murcia (Spain) in 2001, together with his partner C., a Nigerian national, and their son O., born in 2000. In October 2001, C. was deported from Spain without being able to return for ten years. Owing to the fact that the applicant was in Barcelona for work-related reasons, the child was looked after by friends of the couple. As the Child Protection Department had not succeeded in reuniting the child with its mother, O. was declared abandoned and he was subsequently placed in a children's home. In 2007, the Supreme Court upheld the decision of the lower family court and authorised O.'s adoption by the foster family, to which he had been assigned, despite the father's opposition. The adoption order was held in the best interests of the child, having regard to the strong emotional ties O. had created with his foster parents.

Like in the case of *Görgülü*, but this time explicitly, the Court recalled that Article 8 went as far as to include the mere intention to create family life if its failed or incomplete establishment is not attributable to the applicant.¹⁰²⁷ Therefore, the Court restated that 'family life' might also refer to a relationship that could have potentially developed between a natural father and his child

¹⁰²⁴ *Ibid*, para 7.

¹⁰²⁵ *Ibid*, para 32.

¹⁰²⁶ *K.A.B. v Spain*, Application no. 59819/08, 10 April 2012.

¹⁰²⁷ *Ibid*, para 89, quoting the judgment in *Anayo v Germany*, which will be analysed later in this chapter.

born out of wedlock.¹⁰²⁸ In line with the approach adopted in the case of *Schneider*, the Court went on to identify the nature of the relationship between the natural parents and the degree of interest demonstrated by the father both before and after childbirth as the relevant factors to determine the existence of family ties.¹⁰²⁹ However, in this case, the Court ended up focusing only on the second element, at least explicitly.

In particular, it was held that the failed creation of a tie between K.A.B. and O. was not attributable to the father in light of the following circumstances: firstly, the father and his child did not cohabit for a long time; he worked in Barcelona, which was 480 kilometres away from the family home; he had not seen his son since the mother's deportation; and twenty-two days later, the Child Protection Department had taken over the child's guardianship and after another ten days he had been placed in a home, before being assigned to a foster family with a view to adoption.¹⁰³⁰ Moreover, it was noted that K.A.B. had expressed wishes to have contact with his child on several occasions. He had gone to the Child Protection Department twice in person, in 2001 and 2003, arguing to be the biological father of the O. and expressing his intention to undergo a paternity test. In the meantime, he had attempted to collect the necessary financial resources.

Having regard to his precarious situation, the Court was of the opinion that these formalities were sufficient to show that he truly desired to be reunited with his child. On the other hand, in the Court's view, the authorities' inaction, the deportation of the mother without prior verification, the failure to assist the applicant when his social and financial situation was most fragile, and the failure of the courts to give weight to any other responsibility for the child's abandonment, coupled with the passage of time, had decisively contributed to preventing the possibility of reunion between father and son. As a result, the Court concluded that national authorities had failed in their positive obligation to take the necessary steps to ensure the father-child reunification, thus violating Article 8.

Therefore, in the cases following the judgment in *Keegan*, it is possible to observe a shift of focus from the interparental relationship to the father-child tie or, at least, its potential. Moreover, in assessing the father's interest and commitment to his child born out of wedlock, the Court has gradually loosened its criteria. While in the case of *Söderbäck*, emphasis was placed on

¹⁰²⁸ *Ibid.*

¹⁰²⁹ *Ibid.*

¹⁰³⁰ *Ibid.*, paras 91-92.

concrete instances of nurture, in the following two cases – *Görgülü* and *K.A.B.* – the Court seems to be satisfied with mere nurturing intentions. While in the case of *K.A.B.*, these intentions were derived from the applicant’s actions aimed at obtaining contact arrangements, in the case of *Görgülü*, the Court referred generally to the father’s willingness and ability to care for his child, on the basis of the evaluations conducted by the national authorities. However, whether the sufficiency of potential or intended care represents a deliberate evolution in doctrine or the facts of the cases forced the Court to lower its requirements remains to be answered. Indeed, it must be recalled that, in both *Görgülü* and *K.A.B.*, the applicants had had limited opportunities to enjoy contact with their children prior to lodging their applications.

Finally, it seems interesting to point out that, different from the other cases, *Söderbäck* ended with a finding of non-violation. To explore the reason for this different outcome, it might be relevant to begin by observing that, in the cases of *Keegan*, *Görgülü* and *K.A.B.*, the interpretation of Article 8 as implying positive, in addition to negative, obligations played a significant role in determining the final decision. In the judgment of *Keegan*, the Court held that “the Government have advanced no reasons relevant to the welfare of the applicant’s daughter to justify such a departure from the principles that govern the respect for family ties”.¹⁰³¹ In this case, the positive obligation at stake, as was first established in *Marckx*, necessitated acting in a manner calculated to enable that tie to be developed and creating safeguards that enable the child’s integration into his family from the moment of birth.¹⁰³²

Similarly, in the case of *Görgülü*, it was held that the Government, by refusing to grant contact rights to the applicant, “did not fulfil the positive obligation imposed by Article 8 to unite father and son”,¹⁰³³ and having regard to the narrow margin of appreciation enjoyed by States in contact-related matters, the reasons advanced by the Government could not be considered sufficient to justify the interference with the applicant’s right to respect for family life.¹⁰³⁴ The Court analysed the legal question from the perspective of the State’s positive obligations under Article 8 also in the case of *K.A.B.* As a result, a violation was found on the basis that, despite their margin of appreciation, the national authorities had failed in their duty to act particularly promptly

¹⁰³¹ *Ibid*, para 55.

¹⁰³² *Ibid*, para 50.

¹⁰³³ *Ibid*, para 49.

¹⁰³⁴ *Ibid*, para 50.

in such matters and had not made appropriate or sufficient efforts to ensure respect for the applicant's right to be reunited with his son.¹⁰³⁵

Against this trend, the Court did not refer to any positive obligation under Article 8 in the case of *Söderbäck* although the claim of the applicant was considered to fall within the notion of 'family life' under Article 8. Although less explicitly, the Court took the contradictory position held in *X, Y and Z v UK*, according to which family ties existed between the applicant and his child, but their relationship was not entitled to effective respect under Article 8. As you might recall, the case of *X, Y and Z* involved a female-to-male transsexual, in a stable relationship with his female partner, who wished to be recognised as the legal father of a child, born as a result of ART. It must be remembered that, in this case, the absence of a biological link was considered (for the first time) not an obstacle to finding family life. However, it was concluded that, in that specific case, Article 8 did not require the name of the applicant to be registered on the birth certificate, thus ruling out the precedent set down in *Marckx*.

It is relevant to point out that, different from the case of *Keegan* – where the mother-father relationship had ended before the child's birth and the father had seen the child only once – in the case of *X, Y and Z*, X had acted as a social father to Z since childbirth. Similarly, based on the facts of the case, Mr Söderbäck had the chance to meet his child quite periodically (and certainly more than Mr Keegan did). Given that Mr Söderbäck – and, even more so X – had met the child on more than one occasion, it seems almost paradoxical that their cases were not considered to involve positive obligations to respect their family lives. The finding of non-violation of Article 8 in both *Söderbäck* and *X, Y and Z* seems to confirm Kilkelly's view that Article 8's positive obligations are not applied uniformly by the Court and tend to be watered down as the family life at stake becomes further detached from the conventional family.

While, as explained in the previous chapter, X was a female-to-male transsexual who had a stable relationship with his female partner, Mr Söderbäck and the child's mother "were friends but did not have a steady relationship".¹⁰³⁶ Therefore, although the Court's analysis in *Söderbäck* does not contain any reference to the relationship from which the child was born (and neither do the subsequent two judgments), the fact that the biological parents did not have a stable relationship and, arguably, had not planned to have a child, might have played a certain role in

¹⁰³⁵ *Ibid*, para 116.

¹⁰³⁶ *Söderbäck*, para 7.

excluding the application of the positive duty to reunite the father with the child. If this interpretation holds true, the lack of explicit emphasis on the mother-father relationship in the cases following *Keegan* should not be read as signifying a departure from a derivative definition of fatherhood, which is dependent on the interparental relationship to the advantage of a stronger appreciation of the direct tie between the father and the child. Rather, the Court's choice not to approach *Söderbäck* from the perspective of the State's positive obligations seems to suggest that the mother-father relationship retains an essential role in determining the extent to which applicants are owed negative as well as positive obligations. Hence, it seems possible to observe a persisting attachment to a pseudo-marital conception of fatherhood, despite the lack of explicit references to the mother-father relationship as a relevant factor.

Concerning the parties involved, in all cases considered, the main tension seems to occur between the biological father and the adoptive parent(s). However, the latter's interests in maintaining their emotional and social bonds with the child are never explicitly discussed. In the case of *Söderbäck*, the position of the mother's husband is only indirectly given weight, as a result of its coincidence with the best interests of the child.¹⁰³⁷ In relation to the children involved, the Court has consistently affirmed the paramount importance to be attached to their interests in settling such cases. However, the extent to which this principle is actually implemented in the case-law tends to be contingent on the interpretation of the child's best interests endorsed by the Court.

It seems that, with the exception of *Söderbäck*, the Court tends to favour a specific view of the child's best interests, that of being reunited and living with his/her biological parents, instead of another, such as that of providing the child with a stable family unit. This becomes particularly evident in the case of *Görgülü*, where the Court found a violation of Article 8 on the ground that the national authorities had failed to consider the long-term implications of a permanent separation from his biological father on the child.¹⁰³⁸ In so arguing, however, the Court chose to assign priority to the long-term consequences over the impact of cutting the emotional ties with his foster family on the child's wellbeing. The same attitude can be detected in the case of *K.A.B.*, where, although the Court accepted the assessment of the child's best interests undertaken by the national authorities – according to which it was in the child's best interest to continue living with his

¹⁰³⁷ The Court concluded that, having regard to the assessment of the child's best interests made by domestic courts, the decision to grant the child's adoption to the mother's husband did not violate the applicant's right to respect for family life.

¹⁰³⁸ *Görgülü*, para 46.

adoptive family¹⁰³⁹ – it eventually concluded that the national authorities had not taken sufficient and adequate steps to ensure the respect of the father’s right to be reunified with his child.¹⁰⁴⁰

Nonetheless, it is important to note that the finding of a violation in the cases of *Keegan*, *Görgülü* and *K.A.B.* does not result from the application of a general rule, according to which, whenever possible, a child should be raised by his natural father/parents. Rather, the Court seems to argue that the secret placement of children breached the applicants’ right to respect for family life on the ground of their demonstrated interest and commitment to their children and, on the other hand, the national authorities’ failure to facilitate the father-child reunification. The same can be observed with respect to the judgment in *Söderbäck*, despite its opposite outcome. The Court found no violation on the basis of the limited contact between the applicant and his child, coupled with the former’s insufficient promptness to seek the assistance of the social welfare authorities. Accordingly, the rule seems to be that, if there is a better father figure, his claims should prevail over those of the biological father. Therefore, the best interests of the child are assessed in light of the specific circumstances of the case, rather than being the expression of conventional norms around parenting.

It is important to note one final remark on the interpretative tools used by the Court. Firstly, there is no trace of a dynamic interpretation of the Convention. On the contrary, the Court refers to the doctrine of the margin of appreciation in all cases, except in *Keegan*. In the judgment of *Söderbäck*, national authorities were granted a wide margin on the ground that they benefited from closer contact with all parties involved and were, therefore, better placed than a supranational court to strike a fair balance. Despite the use of the doctrine in its structural variant, it seems that it had no effect on the standard of review. Indeed, although the Court relied on the determination of the child’s best interests made by national authorities, it still undertook its own assessment of the concrete ties linking the child with the applicant and his legal father, respectively. In contrast, in the cases of *Görgülü* and *K.A.B.*, the Court does no more than recall the general principles according to which States enjoy a wide margin in settling custody-related matters, while restrictions on contact rights call for stricter scrutiny. However, the doctrine is not incorporated

¹⁰³⁹ *K.A.B.*, para 87.

¹⁰⁴⁰ *Ibid*, paras 115-116. On this point, see Dissenting Opinion of Judge Myjer, para 4.

within the reasoning; rather, it seems to be used merely as a ‘conclusory label’, with no effect on the standard of review.¹⁰⁴¹

Different from the previous set of cases, the doctrine of the margin of appreciation was never invoked in conjunction with the rule of consensus. Nor, did the Court explicitly contest general legal assumptions, thus clearly indicating the willingness to fight stereotypes and affirm a new vision of fatherhood. Nonetheless, both the attention devoted to the particular circumstances of the case and the application of the doctrine of positive obligations might be considered proof that the Court embarked on an anti-stereotyping analysis and, in so doing, attempted to promote a more substantive version of equality.

2.1.3 The Court’s Approach to Unmarried Fatherhood: Change and Continuity

Based on the case-law analysed, it would seem that, as long as the child was born in a stable and committed relationship and there is evidence of the father’s interest and commitment to the child, a violation is found. Therefore, as pointed out by O’Mahony, the jurisprudence up till now seems to suggest that the Court is not only interested in establishing whether the father is willing and committed to developing a relationship with his child and his involvement in the child’s life serves the latter’s best interests.¹⁰⁴² Rather, the Court continues to attach a certain degree of importance to the length and nature of the mother-father relationship, thus conceiving fatherhood as a mediated tie, rather than autonomous.

More specifically, the existence of a sufficiently lengthy and non-casual relationship between the applicant and the child’s mother at the time of conception or before their separation and an element of ‘planning’ seem to be essential to the establishment of family life between the father and his child or, at least, to increase the likelihood to be regarded as family life. This reading of the case-law is further confirmed by subsequent decisions. It is worth mentioning the Commission’s admissibility decision in the case of *M.B. v UK*.¹⁰⁴³ Although the application was

¹⁰⁴¹ In the case of *Görgülü*, the Court concluded that “notwithstanding the domestic authorities’ margin of appreciation, the interference was therefore not proportionate to the legitimate aims pursued” (para 50). In the case of *K.A.B.*, “nonobstant la marge d’appréciation de l’État défendeur en la matière, la Cour conclut que les autorités espagnoles n’ont pas déployé des efforts adéquats et suffisants pour faire respecter le droit du requérant au regroupement avec son enfant, méconnaissant ainsi son droit au respect de sa vie privée, garanti par l’article 8” (para 116).

¹⁰⁴² O’Mahony, ‘Irreconcilable Differences?’ 36.

¹⁰⁴³ *M.B. v the UK*, Application no. 22920/93, 6 April 1994. See also *J.R.M. v the Netherlands*, concerning a sperm donor seeking contact arrangements with his biological child, against the will of the parental lesbian couple. When assessing whether the relationship between the applicant and his biological child fell within the notion of family life,

ultimately declared inadmissible, the decision of the Commission sheds light on the relevance attributed to the mother-father relationship in order to establish the existence of family life as well as on the characteristics that the relationship should have in order to trigger the protection of Article 8.

The applicant began a sexual relationship with a married woman, which ended when the woman discovered she was pregnant. A child, E., was born and the applicant sought parental responsibility and contact arrangements with respect to the child. However, his request was rejected on the ground that admitting the presence of the applicant in E.'s life was likely to be detrimental to her welfare because it would disturb the child's relationship with her mother and legal father and, more generally, the stability of the family unit within which E. has lived since birth.¹⁰⁴⁴ The applicant complained that, by denying him the chance of any future ties with E., national courts had breached his right to respect for family life.

However, the Commission concluded that no family life could be found to exist between them. In order to reach this conclusion, the Commission analysed the circumstances of the case, *vis-à-vis* those in *Keegan*, where the Court established the existence of family life was established. In particular, it was observed that, different from the case of *Keegan*, the applicant and the child's mother had never cohabitated and that their relationship had lasted approximately 6-7 months.¹⁰⁴⁵ Moreover, in this case, the pregnancy was not the result of a deliberate decision, like in the case of *Keegan*, and the applicant had not developed any form of tie with E.. In light of the above, an

the Commission acknowledged that the applicant had regular contact with the child during the first months after birth until May 1988, when the couple refused the sperm donor's desire to obtain visiting rights and accordingly prohibited any further contact. However, in the Court's perception, these visits were only of summary nature, both in terms of time and intensity. As a result, the applicant's contact with the child, even in combination with his donorship, were regarded as insufficient to prove the development of close personal ties between them and, consequently, to qualify as family life. If we compare the situation of the applicant in *J.R.M.* with that of Mr Keegan, it appears quite evident that the Commission must have been influenced by the existence or absence, at some point, of a relationship between the biological parents. Indeed, the sperm donor seems to have had stronger bonds with his child than Mr Keegan. However, in the first case, no family life was found between a sperm donor and his biological child despite their regular visits during the first nine months of life of the child; and, on the contrary, in the case of *Keegan*, family life was found to exist even if the applicant saw the new-born baby only once, when she was one day old. Therefore, in line with the interpretation provided by O'Mahony, it would seem that, in the case of *Keegan*, the Court's assessment was influenced by the fact that the relationship between the applicant and his partner had lasted two years, one of which entailed cohabitation, they had even considered getting married and the birth of the child had been planned. Differently, in the absence of a marriage-like relationship, like in the case of *J.R.M.*, it seems that the father is placed under a heavier burden in establishing the existence of family ties. O'Mahony, 'Irreconcilable Differences?', 36.

¹⁰⁴⁴ *M.B.*, 'The Facts'.

¹⁰⁴⁵ *Ibid*, 'The Law', section a).

unplanned pregnancy resulting from a 6-7 months relationship, with no cohabitation, did not prove sufficient to cause the applicability of Article 8.¹⁰⁴⁶

The only exception to the identified trend of requiring a stable and committed relationship between the biological parents to establish the applicability of Article 8 can be found in the case of *Söderbäck*, where the biological parents were simply friends. In the latter, the Court observed that, at the time of adoption, the existence of certain ties between the applicant and his child was undisputed,¹⁰⁴⁷ hence, Article 8 was declared applicable. This would seem to demonstrate that, in fact, it is not always essential that the mother and the father had a sufficiently stable relationship which would fall within the notion of family life in order to find the existence of family ties between the applicant and his child. However, it must be stressed that, although the lack of a steady relationship between the biological parents did not prevent the finding of family life, it proved decisive in excluding the applicability of the positive obligation to facilitate the reunion of the father with his child born out of wedlock and, consequently, in not finding a violation of Article 8. Therefore, although not essential to establish the existence of family life between an unmarried father and his child born out of wedlock, the mother-father relationship remains necessary to trigger the application of positive obligations and, therefore, a stricter review of the case.

In light of the above, the case-law involving unmarried fatherhood and, more specifically, the judgment in the case of *Söderbäck* displays a tendency to water down the extent of positive obligations when the family life in question becomes further detached from the image of the conventional family. Once family life is established, the State has, at least in principle, both negative and positive obligations towards the individuals involved. However, in the case of *Söderbäck*, the Court appears to have accepted some differential treatment with respect to positive obligations in the absence of a stable and committed relationship between the biological parents. Just like in the case of *X, Y and Z*, the finding of a non-violation led to a paradoxical situation, where the family life of the applicants is recognised but they are, nonetheless, denied a right to enjoy family life.¹⁰⁴⁸

Given the persisting emphasis – either explicit or implicit – on the mother-father relationship, the Court's approach can be seen as part of a broader legal tendency to extend the

¹⁰⁴⁶ *Ibid.*

¹⁰⁴⁷ *Söderbäck v Sweden*, para 24.

¹⁰⁴⁸ E. Kukura, 'Finding family: considering the recognition of same-sex families in International Human Rights Law and the European Court of Human Rights' 2006 13 *Human Rights Briefs* 19.

rights and responsibilities of marriage to those relationships that resemble it.¹⁰⁴⁹ Indeed, it seems almost self-evident that each of these characteristics mentioned – namely, the length, the nature and the ‘planning’ element – is meant to indicate stability and permanence, which, at least in principle, typically belong to the institution of marriage. In so doing, the Court seems to suggest that marriage-type relationships are a desirable *locus*, in which to conceive and raise children. To some extent, this view is backed up by research evidence indicating that long-term, committed cohabitation is almost indistinguishable from marriage, especially in terms of partners’ commitment to each other and their children.¹⁰⁵⁰ What appears to be true is that, statistically, marital relationships are more durable than non-marital ones.¹⁰⁵¹ Nonetheless, it remains extremely difficult to substantiate claims that marriage is exceptionally conducive to certain ‘goods’.¹⁰⁵² Indeed, married and unmarried cohabiting couples are found to share many values and, consequently, the determinants of their behaviour have proved more alike than different.¹⁰⁵³

Despite the relevance of this empirical evidence, it is necessary to keep in mind that the unmarried relationships in dispute in these cases have broken down. Therefore, whilst the Court’s view might respond to a valid *ratio* in intact families, it would be paradoxical to attach a certain degree of decisiveness to the alleged stability of a relationship that ended in order to mimick the image of the marital family. Rather, the emphasis on the mother-child relationship seems to stem from the Court’s awareness of the risk of instrumentalisation inherent in contact and joint residence disputes. In particular, the Court seems to be conscious of the possibility that the applicant fathers are not necessarily concerned with developing or maintaining ties with their children, but they might be more interested in reasserting control over the child’s mothers through contact and joint residence arrangements. In light of this danger, the Court might have kept the interparental relationship as a criterion for testing the true commitment of unmarried fathers towards their children.

More specifically, the Court appears to rely on an assumption linking causal sex with irresponsible fatherhood and sexual intercourse in a committed relationship with responsible

¹⁰⁴⁹ Collier and Sheldon, ‘Fragmenting Fatherhood’, 203.

¹⁰⁵⁰ Collier, ‘Masculinity, Law and the Family’, 206.

¹⁰⁵¹ J. Eekelaar and M. Maclean, ‘Marriage and the Moral Bases of Personal Relationships’ 2004 31(4) *Journal of Law and Society*, 537; A. Thomas and I. Sawhill, ‘For Richer or for Poorer: Marriage as an Antipoverty Strategy’ 2002 21(4) *Journal of Policy Analysis and Management* 596.

¹⁰⁵² J. Eekelaar and M. Maclean, ‘Marriage and the Moral Bases’, 537.

¹⁰⁵³ *Ibid*, 538.

fatherhood. In other words, the degree of stability of the mother-father relationship is held indicative, together with concrete instances of nurture or nurturing intentions, of the father's true motives and intentions. Hence, despite an increased appreciation of the father's actual involvement in the child's life or of his demonstrated interest, the mother-father relationship continues to represent an element against which the truthfulness and the legitimacy of the applicant's claims are assessed. Therefore, when considering the parental relationship, the ultimate goal of the Court does not necessarily lie in the recreation of the image of the conventional marital family, but rather in the search for a criterion to evaluate the father's genuine interest in the child.

Despite the tenacious hold of the marital family (although in a revisited form), a revaluation of the willingness as well as of the parenting suitability of fathers as individuals, rather than as members of a conventional family unit, is undeniable. Among the elements accorded weight, it is worth mentioning, which included: acknowledgment of paternity (*Sahin v Germany*, *Schneider v Germany*), attendance of medical examinations together with the mother (*Schneider v Germany*), presence at birth (*Lebbink v The Netherlands*), frequency of contact (*Söderbäck v Sweden*, *Lebbink v The Netherlands*, *Zaunegger v Germany*), cohabitation between the father and the child (*Zaunegger v Germany*), nurturing activities undertaken by the father (*Lebbink v the Netherlands*: changing diapers, babysitting), promptness to seek the social services' assistance in asserting contact rights (*Söderbäck v Sweden*), and promptness to initiate legal proceedings to obtain contact arrangements (*Schneider v Germany*).

Throughout the listed case-law, the interpretation of the notion of 'father's demonstrated interest' reaches a peak, which resembles the development of the concept of 'family life' under Article 8. In the case of *Schneider*, caring intentions – more than actual nurture – expressed through the acknowledgment of paternity and the prompt initiation of legal proceedings were relied on by the Court to establish the existence of a relationship between an unmarried father and his biological child worthy of protection under Article 8, preferably under the heading of 'family life' or else falling within the notion of 'private life'. Therefore, while the main analytical focus remains on the father-child tie, what is given due regard is the potential of that relationship – rather than its reality – and, more importantly, the fact that its development has been obstructed by external parties. This attitude signals an extraordinary readiness and – to a certain extent – blind trust towards the claims of unmarried fathers. Using Wallbank's analytical framework, it seems as if

the Court grounds the establishment of family life on an optimistic and aspirational view of fathering, whereby men are keen to carry out parenting roles traditionally performed by women.¹⁰⁵⁴

Another channel through which the Court's adherence to the conventional ideology of fatherhood can be measured is biology. Leaving aside the *Schneider* case, the legal definition of fatherhood endorsed by the Court remains marked by a remarkable degree of continuity concerning the significance of the biological link as one of the factors to be considered when attributing parental rights in the post-separation/divorce context. In the cases of *Keegan*, *Görgülü* and *K.A.B.*, the endorsement of a biological conception of fatherhood can be inferred from the specific view of the child's best interests adopted by the Court. By arguing that the tie between an unmarried father and his child should be protected against irreversible processes, like those triggered by adoption, and holding that States have the positive duty to facilitate the reunion between a natural father and his child, the Court seems to consider biology as necessary to set in motion the application of this positive obligation and, therefore, to call for the father-child reunion. In the case of *Görgülü*, the Court went on to explicitly refer to the biological kinship between the applicant as his child, together with former's willingness and ability to look after the child, to conclude that national authorities had failed to examine all possible solutions.

This stance is certainly compatible with the position adopted in the case of *Lebbink*, namely the insufficiency of biological relatedness and the need for additional factual and legal elements, revealing the existence of close personal ties to attract the protection of Article 8. Although not expressly mentioned, biology seems to remain central also in the cases of *Söderbäck*, *Sahin* and *Zaunegger*. Indeed, had the applicants not been the biological fathers, it is doubtful whether the existence of family life between them and their children would have been automatically established. The same, however, cannot be argued in relation to the case of *Schneider v Germany*. In fact, in the latter case, uncertainty as to the existence of a biological link between the applicant and his child was not interpreted as excluding *a priori* any consideration for the applicant's request for contact arrangements. Thus, it would seem that, at least with respect to *Schneider*, biological relatedness does not determine whether the applicant's complaint falls within the notion of family life and, eventually, whether the refusal of contact arrangements amounts to a violation of Article 8.

¹⁰⁵⁴ Wallbank, '(En)gendering', 116.

Overall, although the genetic link seems to remain necessary in order to grant contact/custody rights, biology shares the stage with other two relevant elements: the parental relationship and the applicant's demonstrated interest and commitment to his child. Therefore, it can be argued that, in the context of unmarried fatherhood, the Court endorses a similar view to that emerging from the analysis of the ART-related jurisprudence: the figure of the biological father has not been replaced. Rather, it coexists – peacefully or in tension – with an increased emphasis on nurture/nurturing intentions and a revisited form of marital fatherhood. Hence, also in this context, it seems that the Court has gotten closer to the ideology of 'new fatherhood', which, as previously explained, combines traditional roles with the 'new' image of the father as a carer.

When shaping its jurisprudence on unmarried fatherhood, the Court's analysis almost exclusively focuses on the applicant's right to respect for his family life and the child's best interests. The implications of the kind of relationship with the fathers on the interests of the other parties affected – namely, the biological mother of the child and the adopters – are not taken into account, with the exception of *Söderbäck*. However, also in this case, the position of the mother's husband (prospective adoptive father) is only considered because of its resonance with the child's best interests.

As anticipated, in the case-law stemming from secret placement, the Court endorses a vision of the child's best interests that, although *prima facie* favours the applicant's reunion with his child over the undisturbed continuation of the child's emotional bonds with his foster family, is grounded on the specific circumstances of the case. Accordingly, the rule seems to be that, if there is a better father figure, his claim should prevail over that of the biological. This explains why, despite the willingness of the biological father to take care of the child, the Court concluded that the decision to grant the adoption of the child to the mother's husband did not violate Mr Söderbäck's right to respect for family life. The call for a fact-based investigation of the child's best interests becomes even more visible in the judgments in *Zaunegger* and *Schneider*. While in the case of *Sahin* the Court did not question the national court's determination of the child's best interests, in the two following cases, it found a violation on the ground that national authorities had assumed *a priori* incompatibility between granting contact/residence rights to the applicants and the child's best interests.

More generally, grounding the reasoning (beyond the assessment of the best interests of the child) on the specific circumstances of the case has meant dismissing the regulation of

relationships between unmarried fathers and their children by general presumptions, which – at least in this context – have tended to provoke a negative image of unmarried fathers. In other words, a case-by-case analysis has enabled the Court to react against generalisations by carrying out an anti-stereotyping review of national decisions. Anti-stereotyping efforts are particularly visible in the case-law involving fathers seeking to obtain contact and residence rights against the will of the mother, where the Court explicitly attempts to investigate the reasons underlying the contested provision or decision. Undertaking such inquiry, the Court discloses and contests the operation of stereotypical notions about unmarried fathers. Therefore, the Court's position appears to be in line with the research findings, like those of Dunn et al., who have underlined the inappropriateness of a legal presumption of contact or the use of simple rules, such as 'contact ought to be fostered' or, conversely, 'contact ought to be restrained', when determining post-separation/divorce arrangements.¹⁰⁵⁵

Finally, although the legal issue at stake remained the same – namely, whether unmarried fathers should be granted contact/custody rights after a breakdown in the relationship – throughout the whole jurisprudence, the Court made a rather non-homogeneous use of the doctrine of the margin of appreciation and the interpretation of the Convention as a living instrument. In the cases of *Sahin* and *Söderbäck*, the doctrine of the margin of appreciation was invoked in its structural variant. However, while in the former, the reliance on the doctrine impacted the standard of review, thus facilitating the finding of non-violation of Article 8, in the case of *Söderbäck*, the fact that national authorities were better placed to assess the needs of the individuals involved did not prevent the Court from undertaking its own review. While the judgments in *Keegan* and *Lebbink* contained no reference to the doctrine of the margin of appreciation, in *Görgülü* and *K.A.B.*, the doctrine – although referred to in its general principles – was employed to merely state a conclusion, with no substantial effects on the standard of review.

Interestingly, the doctrine was invoked in conjunction with the rule of consensus – and given the establishment of a common approach, with the interpretation of the Convention as a living instrument – only in the cases of *Zaunegger* and *Schneider*. However, given that the comparative law surveys relied on failed to indicate the existence of a common approach among

¹⁰⁵⁵ J. Dunn, H. Cheng, T. O'Connor and L. Bridges, 'Children's Perspectives on their Relationships With Their Nonresident Fathers: Influences, Outcomes and Implications' 2004 45(3) *Journal of Child Psychology and Psychiatry* 564.

the laws of the Contracting States, the interpretation of the Convention endorsed by the Court ultimately seems to impose new legal conditions, more than reflecting present-day conditions. Therefore, in these two cases, it appears that the law is conceived as a tool that should take inspiration from social change and, in particular, from the patterns of family life in the 21st century (more than from legal realities) and, accordingly, attempt to transform deviant national legal realities.

2.2 Divorced Fathers: Focusing on the Applicant's Behaviour throughout Proceedings

The following analysis is aimed at providing a further channel of comparison between the legal treatment of contact-related claims brought by divorced fathers and unmarried fathers, respectively. As a first observation, it is important to remark that the *petita* sought in the two sets of cases are not identical, although closely related. While unmarried fathers still seek contact rights, most of the divorced fathers lodging a complaint with the Court are concerned with ensuring the implementation of already existing contact orders. Despite this difference, the analysis of the cases brought by divorced fathers will enable us to identify the factors whereby the Court has found, or not found, a violation of the applicant's right to respect for family life and, subsequently, contrast them with the approach adopted *vis-à-vis* the claims of unmarried fathers.

The circumstances of the cases brought by divorced fathers tend to follow the same plot: the non-residential father is unable to have contact with his child following divorce due to the mother's opposition and the alleged failure of the national authorities to implement contact orders. Despite the widespread consensus as to the potential benefit of continuing family relationships, relational dynamics play a crucial role in determining the quantity and quality of post-separation/divorce contact. The maintenance of the relationship between a father and his child is dependent on and situated within a framework of other family relationships, each of which affects the other. Divorce and, more generally, family breakdown is a process which forces parents to position themselves with respect to a series of frequently competing discourses.¹⁰⁵⁶ And, it is widely agreed that high levels of conflict between parents are likely to render the enforcement of contact orders ineffective.¹⁰⁵⁷

¹⁰⁵⁶ K. Kaganas and S. Day Sclater, 'Narrative Constructions of "Good" Parents', 23.

¹⁰⁵⁷ J. Herring, 'Contact in a Private Law Context' in A. Bainham, B. Lindley, M. Richards and L. Trinder, *Children and Their Families: Contact, Rights and Welfare* (Oxford, Hart, 2003), 98.

Given the procedural nature of the issue of enforcement, the resulting judgments are primarily concerned with the subsequent stages and the details of the national proceedings. Although substantial matters are seldom discussed, it is precisely the lack of consideration of those issues that creates opportunities for comparing the expectations raised towards unmarried fathers seeking contact with their children born out of wedlock and divorced fathers attempting to arrange visits. Overall, as shown in the following cases, the reasoning of the Court does not include any consideration pertaining to either the relationship from which the child was born or the concreteness of the father-child relationship during marriage. Rather, when given any explicit weight, the father's intention to preserve his relationship with his biological child has been assessed by focusing on the conduct and attitude assumed by the applicant in the course of the legal proceedings.

In the case of *Glaser v the United Kingdom*, a father of three children complained on the alleged failure of English and Scottish courts to enforce contact arrangements granted in his favour after divorce.¹⁰⁵⁸ He argued, *inter alia*, that the lack of a prompt response by the national courts enabled his former wife to move the children to several addresses, thus significantly reducing (and, eventually, eliminating) the chances of ensuring contact.¹⁰⁵⁹ He also submitted that his ability to initiate enforcement proceedings in Scotland – where the mother and the children moved – was postponed due to a delay in the court informing him of the mother's location.¹⁰⁶⁰ The Court concluded that, although Article 8 encompasses a right for a parent to have measures taken with a view to his or her being reunited with the child, and it therefore entails a positive obligation on the national authorities to take such measures, in this case, the failure was due entirely to the mother's persistent avoidance of the orders and therefore could not be laid at the door of the national authorities.¹⁰⁶¹ Therefore, the Court acknowledged the mother's behaviour, who left the family home and disappeared with the children and her on-going opposition to any contact even when they were located in Scotland, as the primary obstacle to the applicant's enjoyment of his right to contact.

Nonetheless, it seems important to underline that the father's participation in the proceedings was also subject to strict scrutiny in the Court's reasoning. The underlying *ratio* lies

¹⁰⁵⁸ *Glaser v the United Kingdom*, Application no. 32346/96, 19 September 2000.

¹⁰⁵⁹ *Ibid*, para 59.

¹⁰⁶⁰ *Ibid*, para 58.

¹⁰⁶¹ *Ibid*, para 86.

in the fact that “it is, after all, (their) *his* own rights and obligations which are at stake” and, therefore, the applicant’s “active participation can hardly be dispensed within the normal course of events”.¹⁰⁶² Overall, the Court was of the opinion that the non-enforcement was not attributable to the authorities’ failure to take reasonable steps in order to protect the applicant’s right to respect for family life. Rather, it held that, considering the presence of other individuals involved – particularly, children – the authorities succeeded in striking a fair balance between the competing interests.¹⁰⁶³ In so arguing, the Court dismissed the applicant’s complaint concerning the unreasonable expedition of the proceedings and actually stressed his insufficiently proactive behaviour in the course of proceedings.

It was observed, *inter alia*, that he could have applied for the domestic court to hear his application at an earlier stage, rather than waiting for the enforcement order to be issued.¹⁰⁶⁴ Moreover, if he wished any more coercive steps to be taken, he could have pursued legal proceedings aimed at declaring the mother to be in contempt of court, rather than abandoning them throughout the process.¹⁰⁶⁵ Apart from contributing to the failed enforcement of contact orders, the applicant’s omissions appear to be read as revealing his insufficient interest in obtaining contact and, by extension, in preserving his tie with the child.¹⁰⁶⁶ Taken further, the insufficiently

¹⁰⁶² *Ibid*, para 70. *His* added by the author.

¹⁰⁶³ *Ibid*, para 70 and 87.

¹⁰⁶⁴ *Ibid*, para 81.

¹⁰⁶⁵ *Ibid*, para 82.

¹⁰⁶⁶ Another example of this kind is represented by the judgment in the case of *Nuutinen v Finland* (Application 32842/96, 27 June 2000), where the father’s obstreperous and uncooperative behaviour in the course of proceedings was regarded as indicative of his scant intention to establish an emotional connection with the child as well as of his inability to act in the best interests of the child. The Court observed that the applicant had taken sufficient steps before the Finnish courts to obtain the implementation of the contact arrangements (para 135). Nonetheless, no violation of Article 8 was found. In fact, it was found that the applicant himself had contributed to the delays at the enforcement stage by not cooperating sufficiently with the social authorities and by repeatedly behaving in an inappropriate and even aggressive manner towards conciliators and other officials investigating the matter (para 135). See also *Kaleta v Poland*, Application no. 11375/02, 6 April 2009. The Court noted that the unsuccessful enforcement was largely due to the tensions between the applicant and his former wife (para 55). Additionally, the Court drew a link between the applicant’s alleged failure to undertake effective steps to improve his contact with the child and the unsuccessful enforcement of his contact arrangements. In particular, it was argued that the applicant’s absence at meetings for some time, together with the passage of time, irreversibly compromised his relationship with the child (para 58). In the meanwhile, she grew up and became able to make autonomous decisions concerning her own contact with her father. Moreover, although a DNA test confirmed his paternity, the mere fact that the applicant instituted proceedings to question his biological connection with the child could have been interpreted as signifying the father’s wish to escape from his paternal responsibilities and, thus, his lack of intention to participate in the child’s life. In light of the above, the Court concluded that the alleged violation had not occurred, since the father himself had contributed to obstructing the implementation of contact orders (para 56).

proactive attitude of the applicant ended up constituting one of the justifications for not finding a violation of Article 8.

As a further example, the suggested focus on the litigation behaviour of the applicant shines through the case of *Piazzzi v Italy*.¹⁰⁶⁷ In this case, however, the failed enforcement of contact rights was found to breach the divorced father's right to respect for family life. The applicant was a non-resident divorced father, who had been granted contact arrangements with his children. He complained that he was unable to exercise his contact rights due to the alleged failure by the social services to take the necessary measures, for more than seven years. More specifically, he argued that the role of the social services in the enforcement of the court decisions had been too autonomous and that the Youth Court had not ensured proper follow-up after making its decisions. The assessment of the ECtHR charts the subsequent stages of the national proceedings and, in so doing, sheds light on the tenacious litigation behaviour of the applicant *vis-à-vis* the inadequate response and relaxed attitude of national authorities.

As a preliminary step, the applicant complained about the mother's opposition to contact before the Youth Court. On the basis of psychological evidence, the national court held that the mother's conduct amounted to parental alienation. Therefore, although he continued to physically live with his mother, the child was placed in the custody of the social services. The Youth Court further noted that it was in the child's best interest to reconnect with his father. As a result, it was held that the child ought to receive psychological support and contact ought to occur every two weeks, in the presence of a professional. The following day, the applicant sought the assistance of social services in order to ensure the enforcement of the Youth Court's decision.¹⁰⁶⁸ He submitted his first application in December 2003. In the absence of a response, he resubmitted his request to the social services in February 2004. He attended a meeting with the person in charge of his case in June 2004. Since no visit had been arranged up to this point, the applicant reconfirmed his wish to have contact with his child in three letters sent to the social services, between October and December 2005.

His requests were disregarded for a long time and, given the age of the child (eleven years old) and the complex family situation, the passage of time had negative repercussions on the

¹⁰⁶⁷ *Piazzzi v Italy*, Application no. 36168/09, 2 November 2010.

¹⁰⁶⁸ *Ibid*, para 55.

applicant's possibility to reconnect with his child.¹⁰⁶⁹ The social services submitted their first report on the child's psychological condition in 2006. In the meantime, the applicant had pursued the implementation of his contact arrangements before the Youth Court. The latter acknowledged the failed enforcement of the contact orders only in 2008. In its decision, the national court confirmed the contact arrangements previously established and acknowledged that the social services had entrusted the mother with arranging the child's psychological check-ups. Given the child's rage against his father and the expressed refusal to see him, the Youth Court ordered the social services to supervise the child's psychological development and the behaviour of the mother. Throughout 2008 and 2009, the applicant attended further meetings with the social services, which refused to provide him with any information related to the child. The applicant sought an appeal before the Court of Appeal, which rejected his request on the basis that the child (who was seventeen years old at the time) expressed opposition to seeing his father.

In a nutshell, the ECtHR held that national authorities let a situation arising from the non-enforcement of contact orders escalate, thus compromising any possibility for the applicant to reconnect with his child.¹⁰⁷⁰ More specifically, the Youth Court did no more than charging the social services with arranging the meetings; and, the social services, in turn, did no more than entrusting the mother to organise the psychological check-ups for the child.¹⁰⁷¹ As a result, it was concluded that the national authorities had failed to make adequate efforts to ensure a reconnection between the father and the child, thus violating his right to respect for family life. Based on this account, it seems that the Court attempts to underline the active litigation behaviour of the applicant by comparing it with the delayed and passive attitude of national authorities. The applicant's legal initiative and his conduct throughout the proceedings is, once again, the only aspect of his life experience, on which the Court places an emphasis. Taken further, the applicant's litigation behaviour becomes one of the parameters against which a divorced father's genuine interest in his child is measured.

Through such a stance, the Court might express its concerns about the fact that divorced fathers who initiate legal proceedings might not necessarily be moved by a genuine interest in preserving contact with their children. Rather, as emerging from the academic literature, power

¹⁰⁶⁹ *Ibid.*

¹⁰⁷⁰ *Ibid.*, para 61.

¹⁰⁷¹ *Ibid.*, para 59.

struggles with former spouses can sometimes underlie post-divorce tensions between the biological parents of a child. Being aware of this possibility, the Court feels that the applicant fathers' expressed interests in their children cannot always be trusted. Accordingly, just like it has been observed with respect to unmarried fathers, the Court might have felt the need to identify a criterion for testing the applicant's true commitment: while the genuine interest of unmarried fathers is usually derived from, *inter alia*, the nature and length of their relationship with the child's mother, the applicant's behaviour throughout litigation is deemed indicative of a divorced father's true motives.

When considering complaints brought by divorced fathers, the Court has consistently held that "it is undisputed that these matters concern 'family life' within the meaning of Article 8 of the Convention".¹⁰⁷² Bearing in mind the intentionality-based test employed by the Court to assess the existence of family life under Article 8, the obvious existence of family life between a divorced father and his child is not surprising. As previously mentioned, marriage represents the preferred evidence of the intention to create family life and, accordingly, heterosexual married families are automatically granted the status of 'family life'. Moreover, as confirmed by the Court's jurisprudence, the father-child relationship arising out of marriage does not follow the course of the marital relationship between the parents; rather, it survives parental separation and divorce.

In the context of unmarried fatherhood, the Court relies on two main factors considered relevant to settle contact disputes: firstly, the length and the nature of the relationship between the natural parents; secondly, the demonstrated interest and commitment of the father in his child, as revealed by the frequency and the nature of their contact or otherwise by his promptness to initiate legal proceedings to obtain contact arrangements, provided that the lack of previous contact is not attributable to him. Differently, in the case-law involving divorced fathers, it seems that the Court has concentrated all its attention on the post-divorce phase and, therefore, on the behaviour of the father in the course of proceedings as a means of testing the intensity and genuineness of his caring intentions towards the child.

However, given the decisive role of marriage in defining a father-child relationship as worthy of Article 8's protection, why is the parental relationship in cases brought by divorced

¹⁰⁷² *Ibid*, para 57.

fathers not considered at all?¹⁰⁷³ Given the Court's regard for marriage-like relationships in the context of unmarried fathers, the tenacious hold of the marital family should (logically speaking) emerge even more clearly in such circumstances. What appears similarly doubtful is the lack of interest in the concrete dynamics characterising the father-child relationship throughout the marriage. Considering that divorced fathers generally lived with their former wives and children up until divorce, it appears surprising that the Court did not consider the applicants' paternal conduct during the intact marital relationship.

In so doing, the Court does not look for continuity between the pre-divorce relationship of the father with his child and the post-divorce reality. Rather, the right to contact appears to be conceived as a merely post-divorce arrangement and, as such, something to be adjudicated, while past conduct is deemed irrelevant. In order to have his claim considered, a divorced father willing to remain involved in his child's life is required to act in a prompt and collaborative manner throughout the course of proceedings, in view of facilitating the implementation of contact arrangements. In light of this, the Court seems to promote a "free-floating concept of rights",¹⁰⁷⁴ with no corresponding responsibilities, but only to a certain extent. Against feminist voices complaining of a double standard in assessing parental responsibility in relation to contact,¹⁰⁷⁵ the behaviour of divorced fathers is not exempt from scrutiny. Rather, if they fail to report for contact (like in the case of *Glaser v UK*), they are labelled 'irresponsible' and, consequently, considered not meritorious of protection under Article 8. At the same time, however, the lack of any consideration for the applicant's parental conduct during the marriage reveals certain optimism in the Court's approach to divorced fathers and, potentially, a tendency to conceive the role of the law as transformative, more than reflective of widespread gender imbalances in the domain of childcare.

¹⁰⁷³ This should not be read as suggesting that the marital relationship from which the child was born should be held relevant for the purposes of settling cases brought by divorced fathers. Rather, these remarks aim to compare the factors relied on by the Court in the two sets of cases and bring differences and contradictions to the fore.

¹⁰⁷⁴ Bainham, 'Contact as a Right and Obligation', 86 quoting Smart and Neale, 'Arguments against Virtue'.

¹⁰⁷⁵ Smart and Neale, 'Arguments against Virtue', 336; Wallbank, '(En)gendering', 101.

3. Concluding Remarks: Optimism or Reality? And, Which Reality?

Discussing the UK position, Wallbank asserts that contact is likely to be viewed as an end in itself and the goal of contact law is likely to be focused on the future rather than the past.¹⁰⁷⁶ Accordingly, it is argued that professionals tend to put the past to one side and ‘to be constructive’ in order to benefit the child in the future.¹⁰⁷⁷ A certain tendency to enhance paternal involvement in the life of children based on an aspirational vision of fatherhood can be observed more widely. For instance, according to the current provisions regulating residence in Italy, joint residence arrangements are the default rule and, as such, are not necessarily granted on the basis of the father’s involvement during the intact relationship. Evidently, promoting the ideal responsible parent, or a constructive approach to the future, entails the risk of ignoring the gendered nature of parenting which occurred during the relationship.

At least *prima facie*, this perceived need to be forward-looking (as opposed to backward-looking) with respect to the patterns of care during the parental relationship does not seem to penetrate the Strasbourg jurisprudence involving unmarried fathers. In these particular cases, the Court has increasingly focused its reasoning on factual circumstances and, more specifically, on past behaviour demonstrating the father’s interest and commitment to his child. Even in the judgment of *Schneider*, the establishment of intended family life is grounded on facts that demonstrate clear aspirations, not on mere aspirations. Such a backward-looking attitude cannot be observed, to the same extent, in relation to divorced fathers. Indeed, although the Court’s attention remains directed to the specific circumstances of each case, it shows no interest in the father’s conduct throughout marriage, even if the alleged cohabitation between the father and the child would be likely to say something about the nature of their ties and, thus, prove useful to assessing the father’s genuine concern.

Nonetheless, the real question is: are these circumstances focused on *doing* or are these circumstances focused on *being*? In other words, are the decisions taken on the basis of what the applicants *do* or on what they *are*?¹⁰⁷⁸ The answer is both. Throughout the jurisprudence, the interest and commitment of a father to his child is attached some weight – to a lesser or greater extent – in order to establish the existence of family life between them and, possibly, a finding of

¹⁰⁷⁶ Wallbank, ‘(En)gendering’, 111.

¹⁰⁷⁷ L. Trinder, ‘In-Court reconciliation’ in L.J. Thorpe and R. Budden (eds.), *Durable Solutions* (Jordans, 2006).

¹⁰⁷⁸ Question raised by Masson, ‘Parenting by Being’, 132.

a violation of Article 8, taken alone or in conjunction with Article 14. However, it seems interesting to point out that the notion of ‘interest and commitment’ is subject to different interpretations, depending on whether the applicant is an unmarried or divorced father. Whenever available, an unmarried father’s parental investment and, therefore, his involvement in childcare and responsibilities during his intact relationship with the child’s mother are taken into consideration as a starting point for negotiating contact arrangements. Therefore, ‘interest and commitment’ are inferred from acts of nurturing and, more generally, from the concreteness of the social ties, which developed between a father and his child born out of wedlock.

When considering claims brought by divorced fathers, in contrast, the applicant’s ‘interest and commitment’ are measured within a specific timeframe – namely, the post-divorce phase – and, although the applicant’s presence at visits is deemed relevant, his legal actions constitute the strongest evidence. The focus on the applicants’ conduct throughout proceedings might derive from the Court’s fear that, after divorce, fathers can lose interest in child-raising, even if they previously held such interest. Bearing in mind the various studies on fathering after divorce, this concern appears, at least, partially founded. It is well-known and undisputable that many fathers spend little time with their children following divorce. However, this pattern is not necessarily the direct consequence of fathers’ own decisions and behaviour; rather, it is argued that, while fathers are criticised for not being sufficiently present after divorce, at the same time, society as well as law spread misconceptions that make it more difficult for fathers to be as involved as mothers, especially after divorce.¹⁰⁷⁹

Regardless of the different factors deemed relevant, the Court’s increased attention to the interest and commitment of fathers to their children evidently marks a departure from conventional understandings of fatherhood. This aspect of change – which values *doing* – however, coexists with elements of continuity – which, in turn, resonates more with what the applicants *are*. In fact, while contact/custody rights are extended beyond the marital family, they are principally conferred on those who most closely resemble some features of the traditional father role (former partner of the child’s mother, biological father). Therefore, while separation/divorce and, even before,

¹⁰⁷⁹ L. Nielsen, ‘Disenfranchising, Demeaning, and Demoralising Divorced Dads – A Review of the Literature’ 1999 31 *Journal of Divorce and Remarriage* 142-147.

unmarried families suggest cracks in the marital/conventional family model, “these cracks follow rather familiar fault lines.”¹⁰⁸⁰

Two main aspects of continuity can be observed. Firstly, with the exception of Mr Schneider, fathers continue to be valued by virtue of their biological link with the child; secondly, they continued to be located as (former) partners of the child’s mother. Although marriage has lost its unique role in attaching men to children, marriage-type relationships have been viewed through the lens of the best interests of the child within a reconstituted familial domain.¹⁰⁸¹ Concerns for the welfare of the child might, therefore, have played a role in reducing distances between married and unmarried fathers as desirable presences in the lives of children, not only on nurture grounds but also in light of their relationships with the child’s mother. As such, fatherhood remains, at least partially, mediated by the relationship between the natural parents. Although not explicitly discussed in the cases brought by divorced fathers, the importance of both biology and the relationship where the child was born is arguably confirmed by the unfelt need to prove the existence of family life between the applicants and their children.

In Section 1, it was observed that national systems have tended to react to the decline of marriage as a choice or as a life-long commitment by refocusing on biology; in other words, biology has served to substitute marriage in connecting men with children. In line with the so-called “geneticisation of fatherhood”,¹⁰⁸² it has been argued that the end of marriage has often triggered an increased emphasis on the biological link existing between a father and his child born out of wedlock as a source of parental rights. This shift of focus from marriage to genes, however, cannot be detected in the Strasbourg jurisprudence pertaining to unmarried fatherhood. In the latter, biology has not replaced marriage, but rather coexists with a revisited form of marital fatherhood as well as with nurture or nurturing intentions. Certainly, the Court’s approach cannot be defined as a ‘pure genetics approach’, according to which all unmarried fathers are granted rights on the basis of their biological relatedness to the child.¹⁰⁸³

Rather, the Court’s stance increasingly tends to comply with what Collier and Sheldon refer to as a ‘genetics plus scrutiny’ model, whereby rights are granted upon the assessment of the

¹⁰⁸⁰ Sheldon, ‘The Regulation of Reproductive Technologies’, 552.

¹⁰⁸¹ *Ibid.*

¹⁰⁸² Collier and Sheldon, ‘Fragmenting Fatherhood’, 225.

¹⁰⁸³ Collier and Sheldon, ‘Fragmenting Fatherhood’, 201.

parenting suitability of the unmarried father and the closeness of his ties to the child.¹⁰⁸⁴ The latter, in turn, is inferred from both the nature and length of the interparental relationship and the father's caring intentions and, whenever available, his actual involvement in the child's life. Therefore, having regard to national policies which include blanket restrictions on the attribution of contact or residence rights to unmarried fathers or attempt to enforce paternal presence primarily for financial reasons, the Court appears the forerunner in overcoming stereotypical images of unmarried fathers, accepting that unmarried fathers might be genuinely interested and able to take care of their children and, finally, in promoting the idea that also paternal nurture, and not only financial provision, serves the child's best interests.

¹⁰⁸⁴ *Ibid.*

CHAPTER 4 – Fatherhood and Family-Work Reconciliation: Challenging the Male Breadwinner Model?

Introduction

This chapter attempts to bring to the fore the definition of fatherhood endorsed by the Court in the domain of family-work reconciliation, thereby assessing its degree of deviation from the conventional ideology of fatherhood. In line with the previous ones, the structure of the present chapter envisages three main parts. Section 1 aims to describe the EU approach to family-work reconciliation as well as the parental leave policies introduced in Sweden and the Netherlands, as representative of two distinct attempts – one gender-specific and the other gender-neutral – to achieve a more balanced sharing of parental responsibilities between men and women. Section 2 will focus on the jurisprudence of the ECtHR and, in particular, will seek to determine whether and, if so, to what extent the Court departs from the male breadwinner model when adjudicating cases concerning the refusal to grant parental leave to fathers. Finally, Section 3 will draw together the different strings of the analysis and will attempt to provide an answer to the various sub-questions addressed in this thesis.

1. Reconciliation Attempts at the National and EU Levels: Tensions within the System

In recent decades, all major industrialised societies have witnessed a significant transformation in the organisation of employment and care arrangements.¹⁰⁸⁵ A model has supplanted the conventional paradigm of man-breadwinner/woman-homemaker, where men continue to devote their time primarily to paid work, while women juggle employment and unpaid work in the home. Therefore, despite women's heightened participation in the workplace, a fully gender egalitarian “dual-earner-dual-carer society”¹⁰⁸⁶ – where “men and women engage symmetrically in both paid work and unpaid caregiving”¹⁰⁸⁷ and refrain from placing the “primary responsibility for the care

¹⁰⁸⁵ B. Hobson and D. Morgan, ‘Introduction’ in B. Hobson (ed.), *Making Men into Fathers – Men, Masculinities and the Social Politics of Fatherhood* (CUP, 2002), 3.

¹⁰⁸⁶ J. Gornick and M. Meyers, *Families that Work: Policies for Reconciling Parenthood and Employment* (Russell Sage Foundation, 2003), 92.

¹⁰⁸⁷ *Ibid.*

of very young children (...) in the hands of out-of-home carers”¹⁰⁸⁸ – is still far from being a European reality.¹⁰⁸⁹

This failure has been described as a “stalled revolution”¹⁰⁹⁰ or, more recently, as an “incomplete revolution”¹⁰⁹¹ due to two main reasons. Firstly, the revolution has been restricted to certain social groups, in particular couples with higher education and with stronger positions in the labour market.¹⁰⁹² Secondly, “the masculinization of the female life-course has not been matched by an equivalent feminization of the male one”.¹⁰⁹³ More explicitly, men’s engagement in unpaid care work has increased only slightly, thus leaving the division of unpaid care work almost untouched.¹⁰⁹⁴ The combination of a heightened participation of women in paid work and limited or no change at all in the distribution of unpaid family and housework, in turn, has produced what public discourse refers to as a ‘care deficit’.¹⁰⁹⁵

It has been argued that, in Europe, special protections for maternity and pregnancy are almost taken for granted.¹⁰⁹⁶ At the EU level, this is confirmed by the directive on the Safety of Pregnant Workers and Workers Who Have Recently Given Birth or Are Breastfeeding,¹⁰⁹⁷ which requires all States to provide for at least fourteen weeks of paid maternity leave, two of which are

¹⁰⁸⁸ *Ibid.* This model should therefore be distinguished from the ‘full-commodification’ strategy advanced by the early second wave of feminism. In a nutshell, full commodification promotes women’s full-time employment and delegates care work to the market or public services (generally, to other women). As such, it pays mere lip service to the value of equal parenting, since fathers continue to carry out their breadwinner role with no involvement in childcare. See C. McGlynn, *Families and the European Union – Law, Policy and Pluralism* (Cambridge University Press, 2006), 83.

¹⁰⁸⁹ On Italy, for instance, see L. Mencarini and L. Tanturri, ‘Time use, family role-set and childbearing among Italian working women’ 2004 Vol. LX n. 1 *Genius* 111-137; G. Fuochi, L. Mencarini and C. Solera, ‘Involved Fathers and Egalitarian Husbands: by Choice or by Constraint? A Study on Italian Couples with Small Children’ October 2014 n. 370 *Carlo Alberto Notebooks* 1-22.

¹⁰⁹⁰ A. Hochschild and A. Machung, *The Second Shift: Working Parents and the Revolution at Home* (Viking Penguin, 1989), 11.

¹⁰⁹¹ G. Esping-Andersen, *Incomplete Revolution: Adapting Welfare States to Women’s New Roles* (Polity Press, 2009).

¹⁰⁹² Fuochi et al., ‘Involved Fathers and Egalitarian Husbands’, 2.

¹⁰⁹³ *Ibid.*

¹⁰⁹⁴ Hobson and Morgan, ‘Introduction’, 3; N. Dowd, *Redefining Fatherhood* (NYU Press, 2000), 210.

¹⁰⁹⁵ Hobson and Morgan, ‘Introduction’, 3.

¹⁰⁹⁶ J. Suk, ‘Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Reconciliation’ 2010 110(1) *Columbia Law Review* 49. In her writings, Suk points to the major difference existing between the US approach to employment equality, which tends to prioritise individual autonomy, and the European antidiscrimination law, which strives for equality “by promoting a normative vision of the ideal life cycle” to the detriment of individual preferences. The quote is taken from J. Suk, ‘From Antidiscrimination to Equality: Stereotypes and the Life Cycle in the United States and Europe’ 2012 75 *American Journal of Comparative Law* 97.

¹⁰⁹⁷ Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC).

compulsory. Other signs of this protectionist approach are, firstly, the absence of a ‘sister-directive’ on paternity leave and, secondly, the significantly longer duration of maternity leave compared to paternity leave, in all European States.¹⁰⁹⁸ These policies have certainly not helped to form a ‘dual-carer-dual-worker society’ by “crystallising historically embedded gender norms”,¹⁰⁹⁹ such as the assumption that women are primary caregivers and, therefore, best suited to play a preeminent role in the private, and not public, sphere.

In the context of family-work reconciliation, both mothers and fathers experience the stress of balancing family and work obligations, but in different ways. Mothers are subject to social expectations that translate into the prioritisation of family commitments over their professional development and, consequently, curtail their financial independence. Fathers are also expected to comply with different social expectations: their role as breadwinners overshadows their participation to care. Feminist scholars have often analysed issues around family-work reconciliation from the woman’s perspective.¹¹⁰⁰ They have called for the recognition of the value of unpaid family care and domestic work, equal opportunities in the workplace and a restructuring of the culture of work to facilitate reconciliation. They have also argued for greater involvement of fathers in the family realm and this claim has resulted in increased but predominantly financial obligations of fathers in relation to paternity.

At the same time, changing discourses, policies and laws have attempted to redefine and re-position fatherhood by highlighting the image of fathers as carers, and not just as economic providers, in line with the ideology of ‘new fatherhood’. It is precisely because of this climate of change around fatherhood that certain countries have introduced policies to support families in an effort to share paid and unpaid work. Among Western European States, Sweden and the Netherlands have distinguished themselves for their proactive policies for enhancing fathers’

¹⁰⁹⁸ For detailed information about maternity leave and paternity leave currently available in EU States, see U. Jurviste, M. Ppric and G. Sabbati, ‘Maternity and Paternity Leave in the EU’, *European Parliamentary Research Service*, updated in February 2015, online at http://epthinktank.eu/2014/12/19/maternity-and-paternity-leave-in-the-eu/?utm_source=Newsletter&utm_campaign=78d8409ff8-COFACE+News+%7C+February+2015&utm_medium=email&utm_term=0_44df596764-78d8409ff8-49488437 (last access on 4 April 2015).

¹⁰⁹⁹ R. de Silva de Alwis, ‘Examining Gender Stereotyping in New Work/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation’ 2010-2011 *Duke Journal of Law and Policy* 306.

¹¹⁰⁰ N. Dowd, *The Man Question – Male Subordination and Privilege* (NYU Press, 2010), 120. See, for instance, J. Williams and E. Westfall, ‘Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of “Careers” in the Workplace’ 2006 13 *Duke Journal of Gender Law and Policy* 31-53. Examples of this approach can also be found in the following section, which explains how family-work reconciliation has for a long time been predominantly dealt with as a ‘woman’s issue’ within the EU context and related academic scholarship.

nurturing role and, more generally, for their particularly strong capacity for adapting to the weakening of the male breadwinner norm.¹¹⁰¹

In the Swedish context, it is argued, “making men into fathers (...) meant the unmaking of men as sole breadwinners”.¹¹⁰² Since the 1960s, fatherhood has become closer to care than cash in Swedish policy discourse and practice.¹¹⁰³ As observed by Bergman and Hobson, the model of fatherhood in law and policy has shifted from an emphasis on establishing paternity and therefore financial responsibilities to an emphasis on securing fathers’ involvement in childcare through joint custody arrangements and, even before, generous parental leave policies.¹¹⁰⁴ This change has been enabled by a responsive welfare state, which has assumed more and more responsibility in the financial support of children who are no longer living with both parents,¹¹⁰⁵ and plays a prominent role in supporting parents’ dual responsibilities at home and in the workplace.

The case of Sweden is particularly recognised for the so-called ‘daddy month(s)’ programme, which was introduced in 1995 and reformed in 2002.¹¹⁰⁶ This policy provides for a parental leave period of 480 days, which can be distributed over the period until the child turns eight years old or finished first grade in school.¹¹⁰⁷ Parents can split the leave in accordance with their individual preferences, apart from 60 non-transferrable days that must be taken by each parent at the highest benefit rate (80% of their earnings).¹¹⁰⁸ Although it was drafted in gender-neutral terms, it aimed to be, and was perceived as, a policy for fathers.¹¹⁰⁹ Since mothers tend to take at least two months leave, the restriction imposed by the policy attempts to influence and *de facto* only impacts men’s parental leave take-up rates.¹¹¹⁰

Overall, this policy has proved quite successful. In the period of 1993-2004, the share of fathers taking no days of parental leave decreased from 54% to 18%.¹¹¹¹ Moreover, according to

¹¹⁰¹ Hobson and Morgan, ‘Introduction’, 3.

¹¹⁰² H. Bergman and B. Hobson, ‘Compulsory Fatherhood: The Coding of Fatherhood in the Swedish Welfare State’, in B. Hobson (ed.), *Making Men into Fathers – Men, Masculinities and the Social Politics of Fatherhood* (CUP, 2002), 104.

¹¹⁰³ *Ibid.*, 119.

¹¹⁰⁴ *Ibid.*, 93.

¹¹⁰⁵ *Ibid.*, 119.

¹¹⁰⁶ The reform implied an increase from one month to two months of non-transferrable leave.

¹¹⁰⁷ R. Eriksson, ‘Parental Leave in Sweden: the Effects of the Second Daddy Month’ 2005 *Swedish Institute for Social Research – Working Paper n. 5*, 3.

¹¹⁰⁸ Bergman and Hobson, ‘Compulsory Fatherhood’, 109.

¹¹⁰⁹ *Ibid.*

¹¹¹⁰ Eriksson, ‘Parental Leave in Sweden’, 3.

¹¹¹¹ J. Ekberg, R. Eriksson and G. Friebe, ‘Parental Leave – A policy evaluation of the Swedish “Daddy-Month” reform’ 2013 97 *Journal of Public Economics* 142.

existing data, 47% of fathers used approximately one month of parental leave after the introduction of the ‘daddy month(s)’, against 9% prior to the reform. Overall, there has been a steady increase in male share in parental leave, from 0.5% to 20% in 2012.¹¹¹² However, Bergman and Hobson have asserted that these figures should be interpreted with caution.¹¹¹³ Although the policy has achieved its short-term goal of increasing fathers’ take up rates, there seems to be no evidence that fathers who use more parental leave actually engage more in childcare.¹¹¹⁴

For instance, statistical data suggest that fathers tend to avail of parental leave mostly during summer months and around Christmas.¹¹¹⁵ In such context, parental leave risks not supporting the underlying ideology of participatory fathering, and is instead used as a means of prolonging a vacation with the child’s mother.¹¹¹⁶ Moreover, mothers predominantly take the transferrable portion of leave.¹¹¹⁷ This division of the parental leave indicates that men’s career breaks remain less affordable than women’s and, accordingly, men are still expected to act as the main breadwinner.¹¹¹⁸ Therefore, although the image of the father as caregiver has become hegemonic in Swedish society, the use of parental leave remains driven by economic factors and, accordingly, constrained by labour market dynamics.¹¹¹⁹

Different from Sweden, the Dutch government did not introduce policies directly targeted at fathers. Rather, it devised flexible work and parental sharing schemes – which, *inter alia*, provide for a decrease of regular working hours, the creation of new shifts, compressed worked weeks and other flexible work patterns – to assist couples willing to achieve more egalitarian divisions of employment and family responsibilities.¹¹²⁰ As reported by Eurofound, parental leave take-up rates increased for both men and women between 2001 and 2013.¹¹²¹ In 2001, 35% of

¹¹¹² *Ibid*, 143.

¹¹¹³ Bergman and Hobson, ‘Compulsory Fatherhood’, 113.

¹¹¹⁴ Ekberg et al., 142.

¹¹¹⁵ Bergman and Hobson, ‘Compulsory Fatherhood’, 115; Eriksson, ‘Parental Leave in Sweden’, 11.

¹¹¹⁶ *Ibid*.

¹¹¹⁷ The Tavistock Institute, *Shared Parental Leave to Have Minimum Impact on Gender Equality*, May 2014, online at <http://www.tavistockinstitute.org/news/shared-parental-leave-minimal-impact-gender-equality/> (last access on 13 May 2015).

¹¹¹⁸ *Ibid*; L. Plantin, M. Back-Wiklund, S. Kovacheva and M. Guerreiro, ‘Comparing transitions to fatherhood across contexts’ in A. Nilsen, J. Brannen and S. Lewis (eds.), *Transitions to Parenthood in Europe – A comparative life course perspective* (Policy Press, 2012), 69.

¹¹¹⁹ Bergman and Hobson, ‘Compulsory Fatherhood’, 93.

¹¹²⁰ T. Knijn and P. Selten, ‘Transformations of fatherhood: The Netherlands’ in B. Hobson (ed.), *Making Men into Fathers – Men, Masculinities and the Social Politics of Fatherhood* (CUP, 2002), 171.

¹¹²¹ Eurofound, *Promoting the uptake of parental and paternity leave among fathers in the European Union* (Publications Office of the European Union, 2015), 4.

women and less than 10% of men chose to make use of parental leave. In 2013, take-up rates reached 24% for men and over 57% for women. However, most fathers do not have the opportunity to engage in care activities other than during their leisure time and, as a result, women remain in charge of three-quarters of the care work.¹¹²² Research evidence indicates that, although the number of regular working hours has decreased, working time norms remain almost unaltered: most men continue to work full-time, whilst women are more likely to work part-time.¹¹²³ Therefore, the one-and-a-half-earner represents the predominant model among parents.¹¹²⁴

The traditional gendered division of labour between men and women and its repercussions on both families and individuals has emerged as a policy issue, also at the EU level.¹¹²⁵ However, an over-emphasis on the public domain has resulted in measures, which conceive the attainment of gender equality in the workplace as independent of any change in the private dimension of parenthood.¹¹²⁶ Whilst demands for altering the workplace structures are at the core of the EU discussions, the behaviour of men and parents in relation to childcare are rarely questioned and debated.¹¹²⁷ Otherwise stated, within the EU discourse, “reconciliation has (long since) been synonymous with accommodating women”.¹¹²⁸

Prior to the adoption of the Treaty of Amsterdam,¹¹²⁹ the EU endorsed what McGlynn calls a ‘traditional ideology of motherhood’, according to which childcare is the primary, if not the sole, duty of mothers.¹¹³⁰ In so doing, the EU indirectly (re)produced a ‘traditional ideology of fatherhood’, which portrayed fathers as solely breadwinners.¹¹³¹ This attitude shined through the early jurisprudence of the ECJ, such as the judgment in *Hofmann*.¹¹³² In this case, a German father

¹¹²² Knijn and Selten, ‘Transformations of fatherhood’, 173 and 178.

¹¹²³ J. Smithson, S. Lewis, S. Kovacheva, L. den Dulk, B. Peper and A. van Doorne-Huiskes, ‘Supports and constraints for parents: a gendered cross-national perspective’ in A. Nilsen, J. Brannen and S. Lewis (eds.), *Transitions to Parenthood* (Policy Press, 2012), 91.

¹¹²⁴ Knijn and Selten, ‘Transformations of fatherhood’, 173.

¹¹²⁵ The following paragraphs are meant to recall only the key interventions of the EU. For a full account, see E. Caracciolo di Torella, ‘Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union’ 20(1) January 2014 *European Law Journal* 88-106.

¹¹²⁶ McGlynn, ‘Families and the EU’, 87.

¹¹²⁷ *Ibid.*

¹¹²⁸ E. Caracciolo di Torella and A. Masselot, *Reconciling Work and Family Life in EU Law and Policy* (New York: Palgrave MacMillan, 2010), 53.

¹¹²⁹ Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts (2 October 1997, entry into force 1 May 1999).

¹¹³⁰ C. McGlynn, ‘Ideologies of Motherhood in European Community Sex Equality Law’ 2000 6 *European Law Journal* 29-44.

¹¹³¹ Caracciolo di Torella, ‘Brave New Fathers’, 96.

¹¹³² Case C-184/83, *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047.

sought parental leave. He argued that, had he been the child's mother, he would have been granted such an entitlement. The Court clarified that the principle of equal treatment is subject to two exceptions. Gender-specific provisions are not in breach of EU law, if they pursue one of these two aims: first of all, if they seek to ensure the protection of a woman's biological condition during and after pregnancy; secondly, if they are intended to safeguard the special bond between a woman and her child over the period, which follows pregnancy and childbirth.¹¹³³

At least *prima facie*, the Parental Leave Directive 1996¹¹³⁴ puts forward the idea that, concerning the care of young children, men and women should be treated alike.¹¹³⁵ In providing for a non-transferrable (at least, in principle) three months period of leave for mothers and fathers, this Directive addressed parents in gender-neutral terms and, allegedly, promoted an equal sharing of paid and unpaid work between mothers and fathers. *De facto*, however, it did not lead to any advancement in the process of equalising the relations between men and women.¹¹³⁶ If, from a theoretical perspective, gender-neutrality constitutes a fundamental step towards the achievement of equality, from a practical perspective, its ability to create a new set of norms for fatherhood has been constrained by various factors, such as the lack of financial compensation offered to parents and, more importantly, the possibility for Member States to provide for shorter utilisation periods and to opt for transferability.¹¹³⁷ As a consequence, due to the scant use of parental leave by fathers, this provision has become a sort of 'extended maternity leave', thus cementing the image of women as primary caregivers and leaving the 'nature' of fatherhood untouched.

Even after the Treaty of Amsterdam, which considerably strengthened the principle of equality, it is questionable to what extent the EU's commitment to family-work reconciliation translated into practice or remained just rhetoric. New legislative measures, such as the Amended

¹¹³³ *Ibid*, para 24.

¹¹³⁴ Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC.

¹¹³⁵ Caracciolo di Torella, 'Brave New Fathers', 97.

¹¹³⁶ *Ibid*.

¹¹³⁷ M. Weldon-Johns, 'EU Work-Family Policies – Challenging Parental Roles or Reinforcing Gendered Stereotypes?' 19(5) September 2013 *European Law Journal* 679-681; Caracciolo di Torella and Masselot, 'Reconciling Work and Family Life', 74; Caracciolo di Torella, 'Brave New Fathers', 97-98.

Equal Treatment Directive¹¹³⁸ and the Recast Directive,¹¹³⁹ recognised fathers as caregivers for the first time, but failed to confer specific rights on them.¹¹⁴⁰ They did no more than require the same level of protection provided for maternity leave to be extended to paternity and adoption leaves, if Member States have already introduced such rules into national law. A further attempt to revise the Parental Leave Directive was undertaken in March 2010.¹¹⁴¹ Although the consultation process rightly focused on the factors which compromised the successful implementation of the 1996 Directive – in particular, the need for payment as well as for strict non-transferability – the amendments made to the provisions are limited: the duration of parental leave is increased by one month to a minimum of four months leave; it is possible for all but one month to be transferred between partners. Therefore, despite discouraging transferability, the Parental Leave Directive 2010 fails to prohibit it (apart from a month).¹¹⁴² This remains a crucial factor compromising fathers' involvement in family care.¹¹⁴³

A third phase seems to have been inaugurated by the ECJ decision in the case of *Roca Alvarez*,¹¹⁴⁴ where a Spanish law which treated employed mothers and fathers differently in relation to flexible work schedules for feeding the baby was held in breach of the Equal Treatment Directive. This judgment has been perceived as making a U-turn in the EU's previous approach to work-family reconciliation: the Court emphasised, *inter alia*, that reserving the right-holder's legal status to employed mothers was "liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties".¹¹⁴⁵ On this basis, the Court has been praised for not only acknowledging the climate of change around fatherhood, but also for making the most of it by challenging a gender division of labour previously entrenched.¹¹⁴⁶ That said, it remains to be seen how strongly this

¹¹³⁸ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

¹¹³⁹ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities, and equal treatment of men and women in matters of employment and occupation (recast).

¹¹⁴⁰ Caracciolo di Torella, 'Brave New Fathers', 100.

¹¹⁴¹ Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC.

¹¹⁴² Weldon-Johns, 'EU Work-Family Policies', 672.

¹¹⁴³ *Ibid.*

¹¹⁴⁴ Case C-104/09, *Pedro Manuel Roca Alvarez v Sesa Start Espana ETT SA* [2010] ECR 609.

¹¹⁴⁵ *Ibid.*, para 36.

¹¹⁴⁶ Caracciolo di Torella, 'Brave New Fathers', 103.

decision alone – in the absence of, *inter alia*, a legislative framework which confers rights on fathers – can mark an actual departure from the traditional vision of fatherhood.¹¹⁴⁷

National data sources indicate that, although men's parental leave and paternity leave take-up rates are rising in most Member States, they remain relatively low.¹¹⁴⁸ Therefore, as exemplified by the cases of Sweden and the Netherlands, these rights have largely gone unused or have resulted in limited sharing of childcare responsibilities.¹¹⁴⁹ Why is this case? Among other factors, it can be argued that national as well as EU policies have attempted to respond to a care deficit, but they have failed to address its gendered, economic and cultural dimensions. Using Dowd's words, they have lacked "sensitivity to context".¹¹⁵⁰ As pointed out by Seward et al., higher rates of men's parental leave take-up and higher paternal involvement in their children's lives are heavily contingent upon "egalitarian beliefs, the amount and source of income, education and the hours worked".¹¹⁵¹ As a result, while the negotiations around parental leave might, for some couples, be shaped by their individual desires, for others, it is the "logic of gendered choices",¹¹⁵² and, therefore, "interactional pressures and institutional design",¹¹⁵³ which determine who takes leave.

Malin has identified three main obstacles to higher uptake of parental leave by fathers.¹¹⁵⁴ Firstly, fathers tend to be entitled to shorter paid leave than women. As a result, leave compensation and pay disparities make it financially difficult for men, who are generally the higher earner, to use parental leaves.¹¹⁵⁵ Another factor influencing the take up of parental leave is the lack of availability of adequate information about the leave. Employers do not always offer parental leaves to workers and, even when available, these policies are not openly disclosed.¹¹⁵⁶ Thirdly, hostility at the workplace and fear of isolation from the labour market are additional deterrents for fathers who wish to take parental leave.¹¹⁵⁷ It is easy to imagine that, in times of job

¹¹⁴⁷ *Ibid*, 106.

¹¹⁴⁸ Eurofound, 'Promoting the uptake', 3.

¹¹⁴⁹ Dowd, 'The Man Question', 117.

¹¹⁵⁰ N. Dowd, 'Work and Family: Restructuring the Workplace' 1990 *Arizona Law Review* 432.

¹¹⁵¹ R. Seward, D. Yeatts, I. Amin and A. DeWitt, 'Employment Leave and Fathers' Involvement with Children' 2006 8(4) *Men and Masculinities* 405.

¹¹⁵² B. Risman, *Gender Vertigo: American Families in Transition* (Yale University Press, 1998), 29.

¹¹⁵³ *Ibid*.

¹¹⁵⁴ M. Malin, 'Fathers and Parental Leave' 1994 72 *Texas Law Review* 1064-79

¹¹⁵⁵ Malin, 'Fathers and Parental Leave', 1073-1077; Eurofund, 'Promoting the uptake', 5.

¹¹⁵⁶ Malin, 'Fathers and Parental Leave', 1072-1073; Eurofund, 'Promoting the uptake', 5.

¹¹⁵⁷ Malin, 'Fathers and Parental Leave', 1077-1079; Eurofund, 'Promoting the uptake', 5.

insecurity and market competitiveness, these obstacles become even more insurmountable: most fathers do not have the option not to work or find it difficult to make requests to their employers.¹¹⁵⁸

Townsend has described fatherhood as part of a “package deal” composed of four facets: work, marriage, home, and children.¹¹⁵⁹ These four elements are connected to each other: they are mutually reinforcing, although their interactions do not produce a stable balance.¹¹⁶⁰ Fatherhood and employment contribute to reinforcing each other in multiple ways. For instance, having children might offer a reason for devoting oneself to paid employment.¹¹⁶¹ At the same time, employment enables a father to secure adequate housing and financial support for his family.¹¹⁶² Although constructed as an expression of paternal love, however, employment is also likely to alienate fathers from intimate relationships and, therefore, to render the development of emotional ties between a father and his child contingent upon the mediation of their wives, who schedule and manage family life.¹¹⁶³ “Mothers and fathers (therefore) collude in a gendered system of parenting that keeps fathers on the sidelines as helpers, playmates, and occasional disciplinarians”.¹¹⁶⁴

It is no coincidence that, especially in masculinities scholarship, men’s position in paid work and – more particularly, the pressure to be a breadwinner and the reduced opportunities to play a nurturing role – is often referred to as an example of the price men have to pay for privilege.¹¹⁶⁵ Apart from minimising fathers’ involvement, what Williams calls “domesticity” – namely, a gender system which determines the current organisation of market work and family work – “provides for caregiving by marginalizing the caregivers”, thus excluding them (mostly, women) from most of the social positions of authority and responsibility.¹¹⁶⁶ This explains why

¹¹⁵⁸ Hobson and Morgan, ‘Introduction’, 4.

¹¹⁵⁹ N. Townsend, *The Package Deal: Marriage, Work, and Fatherhood in Men’s Lives* (Temple University Press, 2004), 30.

¹¹⁶⁰ *Ibid.*, 79.

¹¹⁶¹ *Ibid.*, 78. For research evidence demonstrating that men work and earn more after becoming a parent, see G. Kaufman and P. Uhlenberg, ‘The influence of parenthood on the work effort of married men and women’ 2000 78 *Social Forces* 931-949.

¹¹⁶² Townsend, ‘Package Deal’, 78.

¹¹⁶³ *Ibid.*, 79.

¹¹⁶⁴ S. Coltrane, ‘Elite Careers and Family Commitment: It’s (Still) about Gender’ November 2004 *The Annals of the American Academy* 216.

¹¹⁶⁵ Dowd, ‘The Man Question’, 59. There is extensive literature on fathering which points to the costs of stress and work-family conflicts for men. For instance, see R. Barnett, N. Marshall and J. Pleck, ‘Men’s Multiple Roles and their Relationship to Men’s Psychological Distress’ 1992 54(3) *Journal of Marriage and the Family* 358-367; M. Bumpus, A. Crouter and S. McHale, ‘Work Demands of Dual-Earner Couples: Implications for Parents’ Knowledge About Children’s Daily Lives in Middle Childhood’ 1999 61(4) *Journal of Marriage and Family* 465-476.

¹¹⁶⁶ J. Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About it* (Oxford University Press, 2000), 1. In addition to William’s perspective, there is considerable feminist scholarship underlining the gendered costs of caring, more specifically the economic, social, political and personal costs borne by women as a

feminists have been long since advocating for paternal involvement partly to share the gendered costs of care and, in the longer-run, to achieve greater gender equality.¹¹⁶⁷ Family-work reconciliation expresses very clearly the idea of complementarity between private and public sphere: as argued by Fredman, “the goal of equal participation of women in the workplace needs to be matched by equal participation of men in the home”.¹¹⁶⁸

2. The Reaction of the Court: Fighting Gender Stereotypes

Compared to the European Union, the ECtHR contribution to the debate around reconciliation has attracted far less attention by legal scholars. This can be attributable to the limited number of relevant cases that have been brought before the Court till now. Moreover, the right to parental leave, which is considered to fall within the scope of the right to respect for family life, represents a recent area of intervention by the Strasbourg Court. After the case of *Petrovic v Austria*,¹¹⁶⁹ which was settled in 1998, the Court harked back to the issue of parental leave only in 2009 and, since then, only two judgments have contributed to discussing and, to some degree, to advancing the roles of fathers in family care: *Weller v Hungary*¹¹⁷⁰ and *Konstantin Markin v Russia*.¹¹⁷¹ In all

result of the gender imbalances in the domain of care. See, *inter alia*, N. Folbre, *Who Pays for the Kids? Gender and the Structures of Constraints* (Routledge, 1994); W. Korpi, ‘Faces of Inequality: Gender, Class and Patterns of Inequalities in Different Types of Welfare States’ 2000 7 *Social Politics* 127-191; G. Esping-Andersen, *Social Foundations of Postindustrial Societies* (OUP, 1999).

¹¹⁶⁷ A. Doucet, *Do Men Mother? Fathering, Care and Domestic Responsibility* (Toronto University Press, 2006), 7-8.

¹¹⁶⁸ S. Fredman, ‘Reversing Roles: Bringing Men into the Frame’ 2014 10(4) *International Law in Context* 442.

¹¹⁶⁹ *Petrovic v Austria*, Application no. 20458/92, 27 March 1998.

¹¹⁷⁰ *Weller v Hungary*, Application no. 44399/05, 31 March 2009.

¹¹⁷¹ *Konstantin Markin v Russia*, Application no. 30078/06, 7 October 2010 (Chamber), 22 March 2012 (Grand Chamber). A few months after the decision in *Markin*, the Court was faced by a similar application. In the case of *Hulea v Romania* (Application no. 33411/05, 2 October 2012), the applicant had worked in the army since 1991. In 2001, his second child was born. His wife, who was a teacher, took parental leave for the first ten months. At the end of this period, the applicant applied for parental leave. The Ministry of Defence rejected this request on the ground that the legislation defining the status of army personnel provided for parental leave for women only. In the meantime, the Constitutional Court held unconstitutional the contested provision, as in breach of the principle of equality before the law and of non-discrimination on grounds of sex, both enshrined in the Constitution. The law, however, was amended to include servicemen among beneficiaries of parental leave, only in January 2006. When drawn to the Court of Appeal’s attention (April 2005), the applicant’s claim was rejected on the ground that the statutory provision in question was not applicable, since the applicant had not provided evidence of having paid his social-insurance contributions necessary to benefit from parental leave. Further, his request for compensation of non-pecuniary damage was rejected as founded. The Court found a violation of Article 14, taken in conjunction with Article 8, on the ground that the court of appeal had refused, without sufficient reasons, to compensate the moral damage suffered by the applicant as a result of the denial of parental leave. This case will not be explored in the text because the judgment is primarily focused on the issue whether the refusal to award compensation for discrimination with respect to his right to parental leave, more than the refusal to grant parental leave to the applicant, breached the Convention.

three cases, the legal question at stake was whether the refusal to grant parental leave to fathers amounted to a violation of Article 14 taken in conjunction with Article 8.

In line with the approach adopted in the previous chapters, the following analysis draws inspiration from a major social transformation, which has had an impact on the functioning of the family, and seeks to decipher the ECtHR's reaction. More specifically, it is the impact of a heightened participation of women in employment on the definition of fatherhood endorsed by the Court that is at the core of the jurisprudential analysis. Against the background provided in the previous section, it will be interesting to understand whether and, if so, to what extent the Strasbourg Court challenges a conventional understanding of fatherhood that, in this specific domain, resonates with the male breadwinner model. Accordingly, this chapter will also investigate whether the abovementioned changing culture of fatherhood, which has given rise to new expectations on men, has crossed national boundaries and permeated the corridors of the Court.

In this domain, the essence of conventional fatherhood and, more generally, of the conventional family is well captured by the 'ideology of domesticity', as defined by Williams. Using her own words, the ideology of domesticity held and, to some extent, continues to hold that "men 'naturally' belong in the market because they are competitive and aggressive; women belong in the home because of their 'natural' focus on relationships, children, and an ethic of care".¹¹⁷² The reference to 'nature' and to the 'natural' link between one specific gender and one specific role sheds light on the strong influence exercised by gender stereotypes in determining a traditional division of labour between men and women. More specifically, "sex-role stereotypes" – namely, those stereotypes, which describe the "proper roles of men and women not by reference to individuals' personality traits, but by the type of conduct desirable for each sex"¹¹⁷³ – tend to give a 'natural' form that must be accomplished to be recognised and appreciated as a man or woman.

The generalised view that men should be the primary breadwinners, whilst women should be mothers and homemakers is, possibly, the most common sex-role stereotype. For the sake of

¹¹⁷² Williams, 'Unbending Gender', 1.

¹¹⁷³ D. Gans, 'Stereotyping and Difference: Planned Parenthood v Casey and the Future of Sex Discrimination Law' 1994-1995 104 *Yale Law Journal* 1877. See also, R. Ashmore and F. Del Boca, 'Conceptual Approaches to Stereotypes Sex Stereotypes and Stereotyping' in D. Hamilton (ed.), *Cognitive Processes in Stereotyping and Intergroup Behaviour* (Erlbaum Associates, 1995), 21.

simplicity, it will be called ‘man-breadwinner/woman-homemaker stereotype’. However, it is intended to comprise at least three distinct, although interrelated, stereotyped notions:¹¹⁷⁴

- Women are, or should be, the primary caregivers and, therefore, they should play a special role in childcare.
- Men should be the primary breadwinners and, therefore, assume the burden of meeting their families’ financial needs and responsibilities because they lack the nurturing attributes that belong to women and, consequently, are worse caregivers than women.
- Women should be homemakers and, therefore, at the centre of the home and family life, undertaking, *inter alia*, domestic responsibilities.

This stereotype displays the characteristic of resilience, which is typical of gender stereotypes.¹¹⁷⁵ In other words, this stereotype is both socially persistent and socially pervasive, thus creating the conditions for social stratification and subordination.¹¹⁷⁶ Indeed, some scholars have pointed out that, despite changes in gender relations – *in primis* women’s entry into the workforce – stereotypes of women have remained quite immutable.¹¹⁷⁷ This does not amount to saying that social change has been ignored completely; rather, it is reflected in “images of subtypes of women”,¹¹⁷⁸ which are quite distant from the general stereotype of women as a group. Gender stereotypes become particularly problematic when they are embedded in law. The latter, often echoing the voice of the State, excuses the application of gender stereotypes and contributes to a climate of legitimacy and normality that enables their perpetuation.¹¹⁷⁹

Given the strong influence of gender stereotyping in organising work and family life, the Court’s departure from the conventional ideology of fatherhood is very much dependent on its ability to uncover and contest sex role stereotypes. In the previous chapter, the Court’s dismissal of generalisations when deciding whether the refusal of contact/custody rights breached Article 14

¹¹⁷⁴ These three stereotypes have been identified by the Constitutional Court of South-Africa in the case of *President of the Republic of South Africa v Hugo*, quoted by R. Cook and S. Cusack, *Gender Stereotyping – Transnational Legal Perspectives* (University of Pennsylvania Press, 2010), 53.

¹¹⁷⁵ Cook and Cusack, ‘Gender Stereotyping’, 22.

¹¹⁷⁶ F. Raday, ‘Culture, Religion and CEDAW’s Article 5(a)’ in H. Schopp-Schilling and C. Flinterman (eds.), *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (Feminist Press, 2000), 68-85.

¹¹⁷⁷ P. Glink and S. Fiske, ‘Sexism and other ‘Isms’: Interdependence, Status and the Ambivalent Content of Stereotypes’ in W. Swann, L. Gilbert and J. Langlois (eds.), *Sexism and Stereotypes in Modern Society: The Gender Science of Janet Taylor Spence* (American Psychological Association, 1999), 195.

¹¹⁷⁸ *Ibid.*

¹¹⁷⁹ Cook and Cusack, ‘Gender Stereotyping’, 36.

taken in conjunction with Article 8 evidently shows that stereotypes are also operative in the context of unmarried fatherhood. However, it was not the ‘gender’ characterisation of those stereotypes that was explicitly contested by the applicants. Only in one case – *Zaunegger v Germany* – did the applicant complain that he had been subject to discrimination not only in comparison with divorced fathers, but also on grounds of sex. Differently, in the case-law concerning family-work reconciliation, Article 14, taken in conjunction with Article 8, is consistently singled out on the basis of sex.

Moreover, it seems relevant to underline that, despite the trend in fighting stereotypes observed in the previous chapter, the Court never used the word ‘stereotype’ with respect to the claims of unmarried fathers. Rather, it preferred to talk about “general considerations”,¹¹⁸⁰ “general feature”,¹¹⁸¹ and “general legal assumption”.¹¹⁸² Against this stance, in the case of *Markin v Russia* – which can be considered paradigmatic of the Court’s position on family-work reconciliation – the Court, for the first time, named ‘gender stereotypes’ as insufficient grounds for justifying a difference in treatment between men and women. This is symptomatic – as it will emerge from the following analysis – of an increased awareness of the Court of its own role in challenging stereotypes as well as of the Court’s undertaking of the anti-stereotyping approach envisaged by Timmer, to near perfection.

Apart from testing the Court’s anti-stereotyping efforts, the jurisprudential analysis will seek to establish to what extent the multiplicity of parties involved – namely the mother, the father and the child – is taken into consideration when declaring that a refusal of the right to parental leave to the applicant father is incompatible with the Convention. More specifically, is the right to parental leave framed in terms of the father’s interests, the best interests of the child, greater equality for women, or labour market needs and whether none, some or all of them apply? In the debates on family-work reconciliation, it has been argued that children tend to be viewed as objects and hindrances, rather than as individuals with their own rights, needs and desires.¹¹⁸³ Just like in the context of separation and divorce, the Court might, therefore, run the risk of endorsing

¹¹⁸⁰ *Sahin v Germany*, Application no. 30943/96, 11 October 2001 (Chamber), paras 58-59.

¹¹⁸¹ *Zaunegger v Germany*, Application no. 22028/04, 3 December 2009, para 56.

¹¹⁸² *Schneider v Germany*, Application no. 17080/07, 15 September 2011, para 100.

¹¹⁸³ McGlynn, ‘Families and the EU’, 90.

an adult-centric vision of family life and face an overall danger of placing children ‘outside’ legal disputes, thus neglecting their experiences and treating them as mere objects of privilege.¹¹⁸⁴

To conclude, compared to the previously considered case-law domains, the Court’s jurisprudence on parental leave is characterised by a certain degree of continuity and consistency. It seems to display at least two clear interrelated trends: firstly, the employment of the law as a tool that is reflective, more than transformative, of national legal realities; secondly, and as a result of changing social and legal realities at the national level, a progressive overcoming of the traditional understanding of fatherhood as the mere breadwinner and, consequently, a growing adherence to the model of ‘new fatherhood’. This move away from conventional fatherhood reaches its peak in the judgment of *Markin v Russia*, where the Court embarks on a complex anti-stereotyping analysis to the benefit of both men and women.

2.1 *Petrovic v Austria*:¹¹⁸⁵ Limited Anti-Stereotyping Efforts and the Perpetuation of a Gendered Division of Labour

In *Petrovic v Austria*, the applicant was denied parental leave allowance by the local authorities on the ground that under the Unemployment Benefit Act 1977 only mothers could benefit from it.¹¹⁸⁶ He brought an action before the local employment office and argued that the legal provision which excluded fathers from the beneficiaries of parental leave allowances was discriminatory and, consequently, unconstitutional. His claim and subsequent appeal to the Vienna Regional Employment Office were dismissed. Finally, he lodged an application in the Constitutional Court. The latter did not accept the case for adjudication due to insufficient prospects of success. It was added that Mr Petrovic’s complaint was unfounded, given that the legislature enjoyed a certain period of time to adjust the law to societal changes.¹¹⁸⁷ Once before the Commission, the applicant alleged that the refusal to grant him a parental leave allowance and the discriminatory nature of that decision amounted to a violation of Article 8 as well as of Article 14 taken in conjunction with

¹¹⁸⁴ C. Smart and B. Neale, ‘“It’s My Life Too” – Children’s Perspectives on Post-Divorce Parenting’ 2000 *Family Law* 163-169; V. May and C. Smart, ‘Silence in Court? Hearing Children in Residence and Contact Disputes’ 2004 16(3) *Child and Family Law Quarterly* 305-315.

¹¹⁸⁵ *Petrovic v Austria*, Application no. 20458/92, 27 March 1998.

¹¹⁸⁶ The law was subsequently amended. As of 1 January 1990, a father is entitled to a parental leave allowance on condition that he is employed, he is the primary caretaker and the child lives under the same roof. Moreover, the mother is either required to have waived the right to parental leave in whole or in part or, if not entitled, to be unable to look after her child as a result of employment.

¹¹⁸⁷ *Petrovic v Austria*, para 13.

Article 8.¹¹⁸⁸ The Commission considered the application admissible only in its second part and it was subsequently submitted to the Court.¹¹⁸⁹

The first issue to be settled concerned the applicability of Article 14 taken in combination with Article 8. While accepting the Government's first submission – namely, that Article 8 did not provide for any positive obligation to financially assist parents in undertaking childcare responsibilities – the Court noted that parental leave allowances aim to advance family life and, inevitably, influenced the latter's organisation by permitting one of the parents to take time off from work and look after the children.¹¹⁹⁰ Since the grant of the allowance at issue demonstrated respect for family life, the applicant's claim was considered to fall within the ambit of Article 8.¹¹⁹¹ Hence, Article 14, taken together with Article 8, was held applicable.

Mr Petrovic substantiated his claim by underlining that, according to the law, the allowance could not be paid until eight weeks after birth and it required the right to receive maternity benefits to be previously exhausted.¹¹⁹² Therefore, in his view, the allowance at issue was not meant to protect mothers but rather to support parents who wished to stay at home and take care of their children.¹¹⁹³ In response, the Government argued that there was no shared European approach to the issue at hand and, consequently, the Austrian legislature's decision to reserve the right to parental leave allowance exclusively to mothers fell within the margin of appreciation of the State.¹¹⁹⁴ As a further justification, the Government noted that the contested provision mirrored the gendered division of labour, which characterised the society at the material time.¹¹⁹⁵

The Court began by clarifying the different purposes between maternity leave (and the related allowances) and parental leave (and the associated allowances). In the Court's view, while the former is primarily designed "to enable the mother to recover from the fatigue of childbirth and to breastfeed her baby if she so wishes", the latter concerned the subsequent period and aimed "to enable the beneficiary to stay home to look after the infant personally".¹¹⁹⁶ It followed that, with regards to the need to look after the child in this period, "both parents are similarly

¹¹⁸⁸ *Ibid*, para 16.

¹¹⁸⁹ *Ibid*, para 17.

¹¹⁹⁰ *Ibid*, para 26.

¹¹⁹¹ *Ibid*, para 29.

¹¹⁹² *Ibid*, para 31.

¹¹⁹³ *Ibid*.

¹¹⁹⁴ *Ibid*, para 32.

¹¹⁹⁵ *Ibid*.

¹¹⁹⁶ *Ibid*, para 36.

placed”.¹¹⁹⁷ Accordingly, it was noted that the advancement of the equality of the sexes was a major goal within the Council of Europe and that very weighty reasons were needed for such differential treatment to be declared compatible with the Convention.¹¹⁹⁸

However, the Court was of the opinion that, as argued by the Government, States should be granted a wide margin of appreciation in deciding whether and to what extent differences in otherwise similar situations justify a different legal treatment.¹¹⁹⁹ Concerning the matter under scrutiny, the Court noted that in the 1980s most jurisdictions did not grant a right to parental leave allowance to fathers.¹²⁰⁰ Rather, the idea of providing financial assistance to one of the parents, at their own discretion, to enable him/her to take care of the child emerged only later.¹²⁰¹ The Court went on to observe that the extension of similar allowances to fathers occurred gradually, in conjunction with an increasingly equal sharing of childcare responsibilities between men and women.¹²⁰² This shift had also taken place within the Austrian legal system: fathers were granted the right to parental leave in 1989 and became eligible for the associated allowance in 1990.¹²⁰³ Therefore, the Court found it difficult and, perhaps, unreasonable to condemn the Austrian Government for having provided for parental leave in a progressive manner, also given that the amended legislation was very forward-thinking in Europe.¹²⁰⁴ To conclude, in light of the wide variety of legal approaches adopted by the States, the Austrian authorities’ refusal to grant the applicant was considered to fall within the State’s margin of appreciation.¹²⁰⁵ Hence, no violation was found.

The Court’s intervention ought to be praised for adequately differentiating between maternity leave and parental leave and, consequently, for taking the critical step of distinguishing between pregnancy and childbirth, on the one hand, and parenthood, on the other hand.¹²⁰⁶ Campaigns for women’s equality in the workplace have often pushed for and led to attempts to secure maternity rights.¹²⁰⁷ The practice of granting rights to women only has, however, given rise

¹¹⁹⁷ *Ibid.*

¹¹⁹⁸ *Ibid.*, para 37.

¹¹⁹⁹ *Ibid.*, para 38.

¹²⁰⁰ *Ibid.*, para 39.

¹²⁰¹ *Ibid.*, para 40.

¹²⁰² *Ibid.*

¹²⁰³ *Ibid.*, para 41.

¹²⁰⁴ *Ibid.*

¹²⁰⁵ *Ibid.*, para 43.

¹²⁰⁶ Fredman, ‘Reversing roles’, 442.

¹²⁰⁷ *Ibid.*

to serious concerns as to its potential danger of reinforcing and entrenching women's responsibility for childcare.¹²⁰⁸ Although aimed at neutralizing disadvantages and ensuring women's participation in the labour market, these policies ultimately "reinforce biological differences, reify social expectations and drive women to lower paying lower categories".¹²⁰⁹ As explained by Fredman, a specific-rights-approach tends, in fact, to treat pregnancy and maternity as a continuum.¹²¹⁰ As a result, fathers are likely to be precluded from the possibility of being either entitled or required to undertake caretaking responsibilities.

Although the Court does not openly talk of stereotypes, it is clear that welfare policies that reserve the right of parental leave to mothers only are informed by gender stereotypes. Indeed, as argued by Cook and Cusack, the extent to which the reality of parenthood is actually gendered and, accordingly, gender-neutral parenting reflects only an aspirational view of fatherhood are irrelevant considerations to determine whether a generalised view can be classified as a stereotype.¹²¹¹ As long as one's needs, wishes, abilities and circumstances are not attached any weight, any generalisation applied to him/her will eventually reach the threshold of stereotyping, even if it describes the actual position of the individual concerned.¹²¹² The present case, therefore, represents the first instance where the Court is directly faced with gender stereotypes and, more precisely, with sex role stereotypes.¹²¹³

However, the anti-stereotyping efforts invested remain limited and the Court ended up not contesting the 'man-breadwinner/woman-homemaker' stereotype because it was not backed up by European consensus.¹²¹⁴ In line with the methodology developed by Timmer, the Court referred to the historical context, in which the contested legislation developed.¹²¹⁵ It observed that "originally, welfare measures of this sort – such as parental leave – were primarily intended to protect mothers

¹²⁰⁸ *Ibid*; Fredman, *Women and the Law* (Clarendon Press, 1997), 192.

¹²⁰⁹ De Silva de Alwis, 'Examining Gender Stereotyping in New Work/Family Reconciliation Policies', 305.

¹²¹⁰ Fredman, 'Reversing Roles', 449.

¹²¹¹ Cook and Cusack, 'Gender Stereotyping', 11.

¹²¹² *Ibid*.

¹²¹³ As anticipated in Section 1, in the case-law brought by unmarried fathers, the Court dealt with gender stereotypes only indirectly, since the discrimination complaints were brought on grounds of marital status.

¹²¹⁴ Two other factors which might have influenced the strictness of review are the financial implications of the measure under scrutiny and the type of claim brought by the applicant. Mr Petrovic brought a claim of passive discrimination and, more specifically, he contested the failure of the State to extend measures applied to one group to another similarly placed group. See O. Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff, 2003), 118, 119 and 145.

¹²¹⁵ Showing awareness of the historical context in which the contested rule or practice developed is among the sub-steps identified by Timmer to successfully 'name' a gender stereotype. See A. Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' 2011 11(4) *Human Rights Law Review* 720.

and to enable them to look after very young children”.¹²¹⁶ In so noting, the Court endorsed the view that these policies were not harmful because their goal was to protect and meet the wishes of mothers to take care of their children. Nonetheless, by not spelling out the current effects of such measures, the Court missed the crucial opportunity of identifying and exposing a harmful stereotype. Despite the promising beginnings, the Court ended up accepting the *de facto* use of the leave by the mother. In so doing, this judgment *de facto* reproduces the traditional ideology of fatherhood which, in this domain, resonates with the male breadwinner model: the father cannot afford to stay at home and receive no remuneration because he is expected to financially provide for his family.

Apart from limiting paternal involvement, discrimination against fathers has negative consequences on the mother and on the entire family. Quite progressively, Judges Bernhardt and Spielmann (in their joint dissenting opinion) pointed out that reserving parental leave allowances to mothers did not only perpetuate a traditional division of roles, according to which childcare is the primary responsibility of women in their capacity as the lower earner or unemployed parent.¹²¹⁷ Moreover, if she chose to continue her professional career and the father chose to stay home to look after the child, the family would have lost out on her allowance entitlement if she took time off from work.¹²¹⁸ The two dissenting judges went as far as to assert that “traditional practices and roles in family life alone do not justify a difference in treatment of men and women”, thus reaching the second phase of the anti-stereotyping analysis.¹²¹⁹

In contrast to these voices of dissent, although it appropriately distinguishes between maternity leave and parental leave, the majority does not show itself to be fully aware of the shortcomings inherent in conferring parental rights to women only. The Court’s limited anti-stereotyping efforts, however, should not be interpreted as indicative of its general inability or unwillingness to contest stereotypes. Rather, the cautious attitude of the Court should be placed in a context, where there was not yet a European consensus on the issue about whether parental leave should be extended to fathers too. Equally, the Court’s reliance on the doctrine of the margin of appreciation as a means of ascertaining whether there had been a violation of Article 14, taken in combination with Article 8 should not be read as the Court’s choice to abstain from engaging with

¹²¹⁶ *Petrovic v Austria*, para 20.

¹²¹⁷ *Ibid*, Joint Dissenting Opinion of Judges Bernhardt and Spielmann.

¹²¹⁸ *Ibid*.

¹²¹⁹ *Ibid*.

the matter in a substantive manner. Rather, as the Court's choice not to go beyond the social and legal conditions at the material time and, therefore, not to push the interpretation of the Convention too far beyond national choices.

As a result, the position held by the Court is that legal change at the national level should follow from social change and the interpretation of the Convention should reflect national legal realities. The Court seems, therefore, to agree with Fineman as to the nature of the law as "more reflective than constitutive of social norms".¹²²⁰ Given the gradual nature of the advancement of the equality of the sexes in European States, inevitably, there is a transitional phase where the law is caught between the needs of the past and those of the future. As such, in the Court's view, States cannot be expected to provide an immediate reform of the law in accordance with a still-evolving reality. Rather, they deserve a sort of a 'grace period' to adjust their legal provisions to the changed social norms and practices. A problematic aspect, however, concerns the establishment of consensus. Indeed, the Court failed to ground its finding as to the lack of consensus on comparative data. Rather, the absence of consensus was presented as a consequence of a progressive – as opposed to, already accomplished – social process.

2.2 *Weller v Hungary*¹²²¹ : The Implicit Refusal of Justifications based on Stereotyped Perceptions

In this case, the first applicant, a Hungarian national, married a Romanian citizen, who gave birth to their twin sons, the second and third applicants. The first applicant applied for maternity benefits in his own name and on behalf of his children. His request was rejected as, according to the Family Support Act, only mothers with Hungarian citizenship, adoptive parents and guardians were entitled to the benefit in question and a natural father could only request such an allowance if the mother died. Moreover, the Act only applied to those non-Hungarian citizens who had obtained settlement permits, being either refugees or citizens of another Member State of the EU. Since the applicant's wife did not fall into either of these categories, the claim was rejected. The first applicant unsuccessfully challenged this decision before the courts. The Regional Court, *inter alia*, explained that "the purpose of maternity benefit was to support the mother and not the entire family

¹²²⁰ M. Fineman, 'The Sexual Family' in M. Fineman, J. Jackson and A. Romero (eds.), *Feminist and Queer Legal Theory – Intimate Encounters, Uncomfortable Conversations* (Ashgate, 2009), 50.

¹²²¹ *Weller v Hungary*, Application no. 44399/05, 31 March 2009.

or the children”.¹²²² As a result, the applicants could not legitimately argue to have suffered discrimination.

Before the Strasbourg Court, the Government invoked the application of the doctrine of the margin of appreciation on the ground that the Member States of the Council of Europe provided for a variety of different social security schemes, especially in relation to maternity allowances.¹²²³ Moreover, it argued that the goal pursued by maternity benefits was not merely pecuniary assistance but consisted in “facilitat(ing) the development of the foetus” and enabling the mother “to maintain a healthy life”.¹²²⁴ In the Government’s view, this was confirmed by the fact that the eligibility for the allowance depended also on the mother’s participation in courses on parental care.¹²²⁵ Therefore, the exclusion of a natural father from the scheme in question was considered justifiable.¹²²⁶

On the contrary, the applicants were of the opinion that, despite its misleading name, the benefit at stake was not intended to reduce the hardship of pregnancy and delivery; rather, since also adoptive parents and guardians were entitled to receive it, its nature was primarily financial.¹²²⁷ At least *prima facie*, this interpretation was confirmed by the text of the relevant domestic law (included in the judgment). Section 1 provided that the Act was aimed to regulate the system and the various types of leave granted by the State, with the ultimate purpose of “promot(ing) the social security of families and to reduce the material burden of bringing up the children”.¹²²⁸ Since the benefit was granted after birth when the responsibilities of both parents became equal, the applicants complained that the provision stipulated in the Family Support Act amounted to discrimination against the first applicant on the basis of parental status.¹²²⁹ In addition to this, the fact that the children were also denied the benefit as a result of their mother’s nationality, even if they were Hungarian nationals by birth, amounted to a difference in treatment compared with other Hungarian children.¹²³⁰ As a result, the applicants complained a breach of Article 14 taken in conjunction with Article 8.

¹²²² *Ibid*, para 12.

¹²²³ *Ibid*, para 16.

¹²²⁴ *Ibid*, para 17.

¹²²⁵ *Ibid*.

¹²²⁶ *Ibid*, para 19.

¹²²⁷ *Ibid*, para 20.

¹²²⁸ *Ibid*, section B of the judgment ‘Relevant Domestic Law’.

¹²²⁹ *Ibid*, para 21.

¹²³⁰ *Ibid*, para 25.

Prior to entering upon the merits of the case, the Court made some general remarks concerning the application of the doctrine of the margin of appreciation and the interpretation of the Convention as a ‘living instrument’. In particular, it held that, although the Contracting States are granted a certain margin of appreciation in establishing whether and under what circumstances differences in otherwise similar situations legitimise a difference in treatment, the final decision as to the compatibility with the Convention’s framework lies with the Court.¹²³¹ In this final evaluation, the Court must take into consideration any “changing conditions” in Contracting States and react to any “emerging consensus” as to the standards to be attained.¹²³²

The Court went on to establish the applicability of Article 14 taken in conjunction with Article 8 in the present case. It briefly held that, since the grant of maternity benefits contributed to respecting the right to respect for family life of the applicants and the latter had been deprived of this allowance on grounds of discrimination, there was no reason to argue otherwise.¹²³³ When assessing whether the difference in treatment breached the Convention, the first step undertaken by the Court consisted in deciphering the nature of the maternity allowance in question. On this point, it shared the same view of the applicants: the benefit at stake refers to the period following childbirth and, accordingly, its nature is primarily pecuniary.¹²³⁴ In line with the applicants’ submissions, the Court pointed to the multiplicity of beneficiaries to further demonstrate that the benefit was designed not only to diminish the hardship of childbirth suffered by the mother, but also to provide support to new-born children and their families.¹²³⁵ Accordingly, the fact that the grant of the benefit was conditional upon the mother’s participation in courses on parental care could be advanced as a decisive counter-argument, since adoptive parents and guardians were clearly not required to meet this requirement.¹²³⁶

When assessing the different treatment suffered by the first applicant, the Court reiterated that mothers and fathers are similarly placed as far as childcare is concerned.¹²³⁷ The Court also acknowledged that Contracting States enjoyed a margin of appreciation in shaping their social security systems.¹²³⁸ However, it was held that the absence of a common European approach did

¹²³¹ *Ibid*, para 28.

¹²³² *Ibid*.

¹²³³ *Ibid*, 29.

¹²³⁴ *Ibid*, para 30.

¹²³⁵ *Ibid*, para 31.

¹²³⁶ *Ibid*.

¹²³⁷ *Ibid*, para 33.

¹²³⁸ *Ibid*, para 34.

not free them from the responsibility to grant these allowances without discrimination.¹²³⁹ Given that the benefit in question was also conferred on adoptive parents and guardians, the Court observed that the first applicant had been discriminated against not on grounds of sex, but rather on the basis of his parental status.¹²⁴⁰ Since no reasonable and objective justification had been offered by the Respondent State to exclude natural fathers from a scheme aimed at supporting all those raising new-borns, the Court found a violation of Article 14, in conjunction with Article 8.¹²⁴¹ The same conclusion was reached with respect to the second and third applicants' exclusion from the benefit. The Court held that the Government had failed to put forward any convincing argument to justify the grant of a maternity benefit on the condition that one specific biological parent, namely the mother, is a Hungarian national.¹²⁴²

If considered from the first applicant's standpoint, the legal issue at stake is very similar, if not identical, to the complaint in the case of *Petrovic*. It is true that, as suggested by Judge Tulkens in her concurring opinion, the leave under scrutiny pursued two different goals: the parental leave scheme considered in the previous case aimed to recover the loss of salary of stay-at-home parents; differently, the maternity benefits claimed by the applicants intended to offer financial assistance to young parents, thus enabling them to take time off work and look after their children.¹²⁴³ Nonetheless, both measures – despite the misrepresentative name of 'maternity benefit' in the present case – were connected to gender-neutral activities, namely to childcare in respect of which mothers and fathers were similarly placed. As a result, the issue to be determined remained the same as in *Petrovic*, namely whether excluding fathers from parental rights – as opposed to maternity rights – constituted a violation of Article 14, in conjunction with Article 8.

However, different from the previous case, the present judgment expressed the Court's refusal to accept a justification that is informed by a stereotyped perception of the group to which the applicant belongs.¹²⁴⁴ What led to a reverse outcome appears to be the existence of an "emerging consensus"¹²⁴⁵ in *Weller*, compared to the finding of "no common standard"¹²⁴⁶ in

¹²³⁹ *Ibid.*

¹²⁴⁰ *Ibid.*, para 33.

¹²⁴¹ *Ibid.*, para 35.

¹²⁴² *Ibid.*, para 38.

¹²⁴³ *Ibid.*, Concurring Opinion of Judge Tulkens.

¹²⁴⁴ This argument is made by Nikolaidis with respect to the judgment in *Marckx v Belgium*, but can be extended to the present case. See C. Nikolaidis, *The Right to Equality in European Human Rights Law – The quest for substance in the jurisprudence of the European Courts* (Routledge, 2015), 70.

¹²⁴⁵ *Weller v Hungary*, para 28.

¹²⁴⁶ *Petrovic v Austria*, para 39.

Petrovic.¹²⁴⁷ Although the significance of any “emerging consensus” for the Court’s assessment appears only under the section ‘general principles’ of the judgment (and it is not reiterated in the following section ‘Application of these principles to the present case’), it seems that it had a concrete impact on the outcome of the case under scrutiny. More specifically, the Court’s reliance on “emerging consensus” narrowed down the margin of appreciation enjoyed by the State and, consequently, led to a stricter review, compared to that carried out in *Petrovic*.

Moreover, while the subject matter in which the Contracting States enjoy a margin of appreciation and its corresponding scope remain to be ascertained on a case-by-case basis, the Court asserts that whenever a State provides for a family allowance scheme, it must confer grants without discrimination. As such, this judgment constitutes an example of what Arnardóttir refers to as a kind of ‘magnifying effect’ of Article 14: where a State decides to accord protection to a certain interest in the form of ‘right’ in its national legislation, although not required and therefore above the minimum standards established by the Convention, it must do so in a non-discriminatory manner.¹²⁴⁸ In this case, therefore, given the discriminatory aspect of the contested decision, the Court felt prepared to find a violation of Article 14, taken in conjunction with Article 8, despite the presence of a merely “emerging consensus” (as opposed to an established European common ground).

Having regard to the anti-stereotyping approach developed by Timmer, the Court has not properly undertaken any of its steps. Nonetheless, by finding a violation of Article 14 taken in conjunction with Article 8, it has *de facto* contested the ‘man-breadwinner/woman-homemaker’ stereotype. Despite reaching the ‘right’ outcome, however, the Court missed the chance to define (although not obliged to) undue (since not related to either pregnancy or childbirth) specific rights as a form of sex discrimination. Secondly, the opportunity to unpack the meaning of the legal provision in question, thus overtly challenging its underlying gender assumptions, was also missed. The Court could have gone beyond the establishment of a difference in treatment and sought to dig a bit deeper into the reasons behind the exclusion of natural fathers from such benefit. In so doing, it could have identified the operative stereotype and, possibly, ‘unmasked’ it by making

¹²⁴⁷ In both cases, however, the Court failed to elaborate on the various legal approaches adopted by States and to provide for concrete figures in order to demonstrate the status of consensus.

¹²⁴⁸ O. Arnardóttir, ‘Discrimination as a magnifying lens – Scope and ambit under Article 14 and Protocol No. 12’ in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2014), 337.

clear the adverse effects of reserving an apparently gender-neutral allowance to mothers, guardians and adoptive parents. Irrespective of the above, the ultimate outcome of this ruling is that of refusing the misconception that fathers are unwilling and unable to take care of their children.

As a final remark, it appears interesting to note that the present application was brought by the father and his children, but not by their mother. In her concurring opinion, Judge Tulkens argues that the mother is actually “the first victim” of the authorities’ refusal to grant the maternity benefits to the father.¹²⁴⁹ In her view, given that the sought benefit is called ‘maternity benefit’, its main purpose was to enable mothers to recover from childbirth and to breastfeed their newborns.¹²⁵⁰ Whilst agreeing on the mother’s ability to fulfil the requirement for the ‘victim status’, a different *ratio* is suggested. Given that the text of the law describes this allowance as benefiting the whole family (despite its title and the Government’s submissions), the mother could have lodged her own application with the Court by relying on the negative impact of an alleged misuse of specific rights beyond the stage of pregnancy and childbirth, within the gender-neutral terrain of parenthood, based on her ability to combine family and work responsibilities.

2.3 *Konstantin Markin v Russia*:¹²⁵¹ Moving Beyond the ‘Maternal Wall’¹²⁵²

The legal question put forward to the Court in the case of *Konstantin Markin v Russia* was whether the refusal to grant parental leave to male military personnel, when such entitlement was available to servicewomen, constituted discrimination on grounds of sex.¹²⁵³ This judgment represents the natural continuation of the jurisprudence analysed thus far and, at the same time, embodies the Court’s most advanced stance on the issue of family-work reconciliation. Like the judgment in *Weller*, it constitutes an example of the Court’s refusal to accept a justification that, in its view,

¹²⁴⁹ *Weller v Hungary*, Concurring Opinion of Judge Tulkens.

¹²⁵⁰ *Ibid.*

¹²⁵¹ *Konstantin Markin v Russia*, Application no. 30078/06, 7 October 2010 (Chamber), 22 March 2012 (Grand Chamber).

¹²⁵² ‘Maternal wall’ is widely used to exemplify the stereotypes and discrimination that women face in the workplace due to three main reasons: “past, present, future pregnancies”, use of maternity leave(s), and part-time or flexible work schedules. See Williams, ‘Unbending Gender’, 69-72; J. Williams and E. Westfall, ‘Deconstructing the Maternal Wall’, 31.

¹²⁵³ For the sake of accuracy, I wish to specify that this is a case of double-, or otherwise called intersectional, discrimination. In the present case, the difference in treatment suffered by Markin is the result of a mix of two different grounds of discrimination, the latter being sex and military status. Under Russian law, men who are civilian workers are in fact entitled to three years’ parental leave, in the same way as women are. On this, see the submissions of the Human Rights Centre of the University of Ghent, para 122 of the judgment.

underlies a stereotyped image of the group to which the applicant belongs. However, the reasoning provided displays a much thicker anti-stereotyping analysis.

In this case, the applicant was a military serviceman and father of three children. Following his divorce with the mother of his children, the couple agreed that the three children would live with their father, while the mother would pay child support. His children being very young at that time, Markin applied for three years' parental leave allowance. His military unit rejected his request because, according to the law, a leave of such duration could only be granted to military servicewomen. When challenging the decision of the military unit before a court, the latter pointed out that he had failed to demonstrate that he was the sole carer of his children. He was eventually granted a three-month parental leave in view of his difficult family situation; this decision was subsequently deemed unlawful and was quashed by a higher military court.

As a last resort, the Mr Markin applied to the Constitutional Court arguing that the contested provisions breached the equality clause in the Constitution. What is particularly interesting, from a gender perspective, is the justification provided by the Russian Constitutional Court, when rejecting Markin's application: "By granting, on an exceptional basis, the right to parental leave to servicewomen only, the legislature took into account, firstly, the limited participation of women in military service and, secondly, the *special role of women associated with motherhood*".¹²⁵⁴ Having exhausted all domestic remedies, Markin lodged an application with the Strasbourg Court arguing that the refusal to grant him parental leave amounted to discrimination on account of his sex, thus breaching Article 14 of the Convention taken in conjunction with Article 8.

On 22 March 2012, the Grand Chamber – confirming the Chamber's findings – came to the conclusion that the difference in treatment, of which the applicant was a victim, could not be considered reasonably or objectively justified; thus, there had been a violation of Article 14 in conjunction with Article 8. Clearly, this has to be considered a landmark decision in the context of redefining the rights and responsibilities of fatherhood and the Court's reasoning can be viewed as progressive in many regards. Having regard to the anti-stereotyping analysis illustrated in

¹²⁵⁴ *Markin v Russia* (Chamber), para 19; *Markin v Russia* (Grand Chamber), para 34 (emphasis added). The Constitutional Court pointed to the limited participation of women in military service resulting in their entitlement to parental leave not having any impact on the fighting power and operational effectiveness of the armed forces. However, due to its limited relevance for the purposes of this thesis, the Court's response to the 'national security' justification is not considered any further.

Chapter 1, the judgment of the Grand Chamber certainly represents a successful attempt to combat gender stereotypes in order to support gender egalitarian dynamics.

Prior to entering upon the merits, the Grand Chamber – and, previously, the Chamber – shared some general remarks on its own procedure to establish the existence of discrimination contrary to Article 14. In particular, it was explained that not every difference in treatment necessarily amounted to a violation of the Convention.¹²⁵⁵ Rather, in order to be held discriminatory, a difference in treatment must have no objective and reasonable justification.¹²⁵⁶ In other words, to be held compatible with the Convention, a difference in treatment has to pursue a legitimate aim and stem from a relationship of proportionality between the means employed and the aim sought.¹²⁵⁷ Concerning the doctrine of the margin of appreciation, the Court – in both its compositions – recalled the general rules stated in the judgment of *Weller* (at paragraph 28).¹²⁵⁸

The Court began by assessing the applicability of Article 14, taken in conjunction with Article 8, to the case at hand. Once again, it was noted that, by allowing one parent to take time off from work and look after his/her child, parental leave and related allowances promoted respect for family life and, consequently, fell under the scope of Article 8.¹²⁵⁹ As in its previous two judgments, the Court acknowledged that, in so far as the role of taking care of the child is concerned, men and women are “similarly placed”.¹²⁶⁰ Indeed, as explained in the *Petrovic* judgment, parental leave – different from maternity leave – relates to the period following childbirth and aims to enable parents to stay home and look after their young children personally.¹²⁶¹ Once established that, for the purposes of parental leave, the applicant, a serviceman, was in an analogous position to servicewomen, the Court went on to examine whether very weighty reasons had been put forward for such a difference in treatment to be held compatible with the Convention.¹²⁶²

Despite the same incipit, when considering the Government’s argument relating to the special role of women in bringing up children, the Court’s assessment overturns its previous jurisprudence. As explained above, in the case of *Petrovic v Austria*, a distinction on the basis of

¹²⁵⁵ *Markin v Russia* (Chamber), para 43; *Markin v Russia* (Grand Chamber) para 125.

¹²⁵⁶ *Ibid.*

¹²⁵⁷ *Ibid.*

¹²⁵⁸ *Markin v Russia* (Chamber), para 44; *Markin v Russia* (Grand Chamber), para 126.

¹²⁵⁹ *Markin v Russia* (Chamber), para 45; *Markin v Russia* (Grand Chamber), para 130.

¹²⁶⁰ *Markin v Russia* (Chamber), para 48; *Markin v Russia* (Grand Chamber), para 132.

¹²⁶¹ *Markin v Russia* (Grand Chamber), para 132.

¹²⁶² *Markin v Russia* (Chamber), para 47; *Markin v Russia* (Grand Chamber), para 137.

sex with respect to parental leave entitlements was found not to be in violation of Article 14 because, at the material time (the 1980s), there was no European consensus concerning the matter in question.¹²⁶³ However, it was noted that, in the subsequent case of *Weller v Hungary*, the Court had departed from the outcome in *Petrovic* by concluding that the exclusion of natural fathers from benefits granted to mothers, guardians and adoptive parents constituted a violation of Article 14 taken in conjunction with Article 8.¹²⁶⁴ It was further added that, since the adoption of the judgment in the *Petrovic* case, the legal situation had evolved: in the majority of Contracting States, including Russia, parental leave entitlements had been made available to both mothers and fathers and, more importantly, to both servicemen and servicewomen.¹²⁶⁵ In the Chamber's view, this was an unequivocal sign that contemporary European societies had gradually moved towards a more equal sharing of childcare responsibilities between men and women and that, most importantly, men's caring role had gained recognition.¹²⁶⁶

Hence, unlike the Austrian authorities, the Russian Government could no longer rely on the absence of a common standard between the Contracting States to justify the different treatment in connection with parental leave.¹²⁶⁷ Therefore, despite starting off with the same observations as in the *Petrovic* case, the Court eventually dismissed the applicability of the doctrine of the margin of appreciation and concluded that the current societal and legal realities no longer allowed for parental leave policies that excluded fathers. In other words, the Court implicitly states that, a notion that has been generally held true for several years and decades might be legitimately called into question when it becomes obsolete and it reflects an old-fashioned vision of the roles of men and women. Hence, the overturning of *Petrovic* in fact shows consistency and, more specifically, the Court's reliance on national realities – both social and legal – to advance a new interpretation of the Convention provision. Reality had changed and, in turn, the Convention had to be reinterpreted and applied differently.

The Court also added that, rather than compensating for factual inequalities between men and women, the contested difference in treatment ended up reinforcing gender stereotypes to the detriment of women's professional career and men's family life.¹²⁶⁸ The Court went even further

¹²⁶³ *Markin v Russia* (Chamber), para 49; *Markin v Russia* (Grand Chamber), para 139.

¹²⁶⁴ *Ibid.*

¹²⁶⁵ *Markin v Russia* (Chamber), para 49; *Markin v Russia* (Grand Chamber), para 140.

¹²⁶⁶ *Markin v Russia* (Chamber), para 49.

¹²⁶⁷ *Ibid.*

¹²⁶⁸ *Markin v Russia* (Grand Chamber), para 141.

to clarify ‘beyond any reasonable doubt’ that “reference to traditions prevailing in a certain country”¹²⁶⁹ does not amount to sufficient justification for a difference in treatment. More specifically, the Grand Chamber held that:

[G]ender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinner, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin or sexual orientation.¹²⁷⁰

In so arguing, the Court explicitly dismissed the Government’s argument concerning the allegedly evidence-based special biological and psychological connection between the mother and the new-born child in the period following the birth as not convincing.¹²⁷¹ Nor was the Court persuaded by the second argument advanced by the Government; namely that extending entitlements of parental leave to servicemen would have impaired the effectiveness of the armed forces.¹²⁷² As a result, it was concluded that the difference in treatment could not be held reasonably or objectively justified and, as such, amounted to a violation of Article 14, in conjunction with Article 8.

Through the judgment of *Markin*, the dissenting opinion expressed by Judges Bernhardt and Spielmann in the case of *Petrovic* reaches the stage of majority and becomes majoritarian. Sex role stereotyping formed the cornerstone of the present judgment. For the first time in its case-law concerning the right to parental leave, the Court is explicit in naming the man-breadwinner/woman-homemaker stereotype. It empathically asserted that the contended provisions rested on traditional gender roles and gender stereotypes, which perpetuate *de facto* discrimination against both men and women. In order to identify the stereotype at stake, the Court engaged in a careful examination of the reasoning provided by the Constitutional Court and the Government to justify excluding servicemen from parental leave allowances. It could have further relied on the facts of the case and, more specifically, on the applicant’s engagement in childcare

¹²⁶⁹ *Markin v Russia* (Grand Chamber), para 142.

¹²⁷⁰ *Markin v Russia* (Grand Chamber), para 143. On this point, as well as on many others, the Grand Chamber agreed with the Chamber – see Chamber’s judgment, para 49: “nor can the reference to the traditional perception of women as primary child-carers provide sufficient justification for the exclusion of the father from the entitlement to take parental leave if he so wishes”.

¹²⁷¹ *Markin v Russia* (Grand Chamber), para 132.

¹²⁷² For the reasoning adduced by the Court, see paras 144-149 of the Grand Chamber’s judgment.

as a sole parent after his divorce with the children's mother. By drawing attention to this circumstance, the Court could have more tangibly proved the untenability of sex role generalisations.

For instance, the post-divorce agreement which conferred the full childcare responsibility on Mr Markin could have been read as a clear manifestation of Markin's intention to act as a parent. Moreover, the applicant's desire to become and remain involved in the life of his children could have been further deduced from the institution of proceedings aimed at opposing the national authorities' refusal and at obtaining three years' parental leave. Finally, Markin's actual participation in his children's development could also be inferred from his systematic absences from the place of work, for which he was repeatedly disciplined. However, the Court decided not to rely on the individual circumstances of the applicant, possibly due to the ambiguity surrounding his family situation. After the Chamber's judgment, new relevant circumstances emerged that casted doubt over the accuracy of the factual account initially provided: as submitted by the Government, Markin had remarried his former wife in April 2008, they had a fourth child together in August 2010 and, apparently, they had never ceased living together.¹²⁷³ By not relying on the specific circumstances of the case, the Court, therefore, seems to promote the conferral of parental leave on fathers (and not only on mothers), on grounds of an aspirational vision of fatherhood and gender equality.

Apart from identifying and exposing sex role stereotyping, the Court took another step in its process of 'naming' by acknowledging the harm of stereotypes on both men and women. Apart from raising women's inferiority in the public sphere as a result of gender stereotypes, the Court throws light on the other side of the coin, namely the inferior status of fatherhood within the domain of care, compared to the superior status of motherhood.¹²⁷⁴ As argued by Williams and Segal, men as well women are affected by the maternal wall when they apply for parental leave or otherwise undertake traditionally feminine nurturing roles.¹²⁷⁵ In this regard, the Grand Chamber's assessment offers a more comprehensive account of the context, if compared with that of the

¹²⁷³ *Markin v Russia* (Grand Chamber), para 41. In addition to these new circumstances, other facts that were already known at the stage of the hearing before the Chamber could have casted doubts as to the actual life of the former spouses. See the dissenting opinion of Judge Popovic to the Grand Chamber's judgment, paras 1-2. According to him, it is precisely on the ground of these facts that the applicant should not have been recognised the 'victim status'.

¹²⁷⁴ See para 141 of the Grand Chamber's judgment: "Such difference has the effect of perpetuating gender stereotypes, and is disadvantageous both to women's careers and to men's family life".

¹²⁷⁵ J. Williams and N. Segal, 'Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job' 2003 26 *Harvard Women's Law Journal* 79.

Chamber's.¹²⁷⁶ The latter had merely argued that "the reference to the traditional perception of women as primary child-carers (cannot) provide sufficient justification for the exclusion of the father from the entitlement to take parental leave if he so wishes".¹²⁷⁷ Thus, this argument had been criticised for drawing attention to the effect of forcing military servicemen who are also primary caretakers to choose between professional and family life, while disregarding the impact of gender stereotypes on women's access to and successful pursuit of a career within the army.¹²⁷⁸

Differently, the Grand Chamber recognises the double-sided harm of gender stereotypes: it held that "such difference has the effect of perpetuating gender stereotypes, and is disadvantageous both to women's careers and to men's family life".¹²⁷⁹ In so arguing, the Court enriches its process of 'naming' by identifying the law as a means of perpetuating the stereotype under scrutiny. Nonetheless, part of the above criticism continues to hold true even with respect to the Grand Chamber's judgment. Indeed, although the Court goes exceptionally beyond the arguments submitted by the parties by considering the impact of the contested decision on women's participation in paid employment, the Court still fails to mention how excluding men from parental leave entitlements contributes to worsening the double shift of women.

Following the anti-stereotyping approach illustrated above, the Court successfully embarks also on the phase of 'contesting'. Among the multiple steps taken, Article 14 was declared applicable, the very weighty reasons test was employed and, more importantly, gender stereotypes were considered insufficient justification for a difference in treatment. In so doing, the Court establishes that generalisations are not accepted as a reason to breach the human rights of individuals and, moreover, it indicates that it will not accept the culturally-dominant gender ideology as true without questioning or testing it.¹²⁸⁰ The application of the very weighty reasons test logically resulted in the State being left with a narrow margin of appreciation. This represents a further distinguishing element in the present judgment, if compared to the *Petrovic* case. Indeed,

¹²⁷⁶ O. Arnardóttir, 'The Differences that Make a Difference: Recent Developments on the Discrimination Grounds and the Margin of Appreciation under Article 14 of the European Convention on Human Rights' 2014 14 *Human Rights Law Review* 653-654.

¹²⁷⁷ *Markin v Russia* (Chamber), para 49.

¹²⁷⁸ Timmer, 'Toward an Anti-Stereotyping Approach', 729; A. Timmer, 'From Inclusion to Transformation: Rewriting *Konstantin Markin v Russia*' in E. Brems (ed.), *Diversity and European Human Rights: Rewriting Judgments of the ECHR* (CUP, 2012), 162.

¹²⁷⁹ *Markin v Russia* (Grand Chamber), para 141.

¹²⁸⁰ Timmer, 'From Inclusion to Transformation', 157.

in the latter, the lack of a European consensus was given priority over the existence of a suspect ground of discrimination and eventually overruled the need for very weighty reasons.

Apart from being connected to the application of the very weighty reasons test, the limited width of the margin is also determined by the existence of a European consensus on the matter under scrutiny. Different from the previous two judgments, in the case of *Markin*, the Court made a significant effort to provide evidence of the suggested shared approach among Contracting States by conducting comparative law research and enclosing its detailed findings in the text of the judgment. Two main trends have emerged: firstly, as far as civilians are concerned, both parents are entitled to parental leave in twenty-eight out of the thirty-three (properly listed) States considered;¹²⁸¹ out of the same sample, twenty-three States provide for parental leave to both servicemen and servicewomen.¹²⁸²

Despite the Court's demonstrated awareness of the impact of gender stereotypes on both men and women, what is still not considered is the harm that the 'male breadwinner/female homemaker' stereotype inflicts on children. Although extensive research evidence has cogently proved correlations between parental leave and children's cognitive and socio-economic outcomes,¹²⁸³ the right to parental leave is paradoxically conceived as only a tool for parents to balance their family life and work life, thus freeing men from gender stereotypes and promoting women's gender equality in the workplace. However, the Court's reasoning does not make any reference to the fact that, apart from harming the father's right to respect for family life and the mother's interests in pursuing a professional career, the refusal to grant parental leave to servicemen might have an ultimate impact on the child's wellbeing.¹²⁸⁴

¹²⁸¹ *Markin v Russia* (Grand Chamber), paras 71-72.

¹²⁸² *Ibid*, para 74.

¹²⁸³ See, *inter alia*, D. Gioacchino, 'Parental care, Children's Cognitive Abilities and Economic Growth: The Role of Fathers' 2012 2(3) *Theoretical Economics Letters* 258-261; Q. Liu and O. Skans, 'The duration of paid parental leave and children's scholastic performance' 2010 10(1) *The B.E. Journal of Economic Analysis and Policy* 1-35; S. Tanaka, 'Parental leave and child health across OECD countries' 2005 515(501) *The Economic Journal* F7-F28; C. Rhum, 'Parental Employment and Child Cognitive Development' 2004 39 (10) *Journal of Human Resources* 155-192.

¹²⁸⁴ This argument was brought by the applicant in the case of *Hulea v Romania*, Application no. 33411/05, 2 October 2012. The applicant complained that the ineligibility of servicemen for parental leave (while available to servicewomen) did not only amount to discrimination on grounds of sex (thus violating Article 14, in conjunction with Article 8 of the Convention), but it also ran counter the best interests of the child. This might be due to the fact that the judgment was primarily focused on the issue whether the refusal to award compensation for discrimination with respect to his right to parental leave, more than the refusal to grant parental leave to the applicant, breached Article 14 taken in conjunction with Article 8.

It seems clear that policies seeking to free parents from a workplace culture that leaves them no or limited time to care for their children can be legitimately invoked to meet not only the wishes of the adults concerned, but also the best interests of the child.¹²⁸⁵ Indeed, reiterating the expression used by Judge Tulkens in her concurring opinion to the judgment in *Weller*, it can be argued that the child was the “first victim” of the national authorities’ refusal to grant parental leave to Mr Markin, as it had the factual result of depriving the child from the care of one of his parents at a very early age. By failing to consider the child’s interests, the Court constructs the right to parental leave from an essentially adult-centric perspective. This perception is allegedly reflective of a wider view of parenting as “something which is ‘done’ to children”¹²⁸⁶ and conceives children as dependent and in need of protection, thus giving little consideration to their subjectivity.¹²⁸⁷

Finally, the case of *Markin* brings a further novel element, if compared to the previous jurisprudence, and an important issue to the table. It is widely agreed that resolving or, at least, alleviating family-work conflicts requires not only shifts within the private triangle, but also a complementary reorganisation of the workplace and increased involvement of the State.¹²⁸⁸ In certain contexts, certainly in the US, the primary responsibility for the wellbeing of children is placed upon the private family, as opposed to the public State.¹²⁸⁹ As explained by Fineman, the autonomy of the private family to fulfil this responsibility independently of the State and the market is contingent upon its ability to provide for both economic support and caretaking labour and, therefore, upon the existence of a gendered division of labour within the family itself.¹²⁹⁰ As a result, “men’s role as economic providers serves an essential function in an ideological system in which dependency is privatised and will not be readily displaced until there is some greater public responsibility for the provision of essential goods”.¹²⁹¹

Although still confined to a concurring opinion, the issue whether Article 8 entails a positive obligation on States to create a legal system of parental leave was openly discussed for

¹²⁸⁵ McGlynn, ‘Families and the EU’, 90.

¹²⁸⁶ *Ibid.*, 89.

¹²⁸⁷ A. James, ‘Parents: A Children’s Perspective’ in A. Bainham et al. (eds.), *What is a Parent?* 181-183, quoted by McGlynn, ‘Families and the EU’, 90.

¹²⁸⁸ N. Dowd, ‘Fathers and the Supreme Court: Founding Fathers and Nurturing Fathers’ 2005 54 *Emory Law Journal* 1324; Dowd, ‘Work and Family’, 431-500; M. Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004), 201; Fredman, ‘Women and the Law’, 206-244.

¹²⁸⁹ Fineman, ‘The Autonomy Myth’, 199.

¹²⁹⁰ *Ibid.*

¹²⁹¹ *Ibid.*

the first time by Judge Pinto De Albuquerque. In his concurring opinion, the latter argues that the right to parental leave does not only fall within the scope of Article 8, but is a Convention right.¹²⁹² More specifically, it represents an additional component of the right to respect for family life, which the Convention – interpreted as a living instrument – certainly includes.¹²⁹³ He extrapolated the two main consequences from this understanding of the right to parental leave: firstly, its protection is ensured by Article 8, regardless of any discrimination contrary to Article 14; secondly, States are under the obligation to provide for parental leave policies.¹²⁹⁴ It remains to be seen whether, in the wake of the joint dissenting opinion of Judges Bernhardt and Spielmann in the case of *Petrovic*, the question raised by concurring opinion of Judge Pinto De Albuquerque will eventually prove prophetic and draw the attention of the majority.

To conclude, although the Court does not go as far as to discuss States' positive obligations in the context of equality, it attempts to "challenge the deeply ingrained gender roles and gendered ideology on which society is based".¹²⁹⁵ It does so by piercing through gender stereotype that men are not caring and their role is only in the market.¹²⁹⁶ By refusing references to traditional division of roles between men and women as a sufficient justification to exclude fathers from the right to parental leave, it implicitly promotes the idea that fathers are able to nurture children as much as mothers. In so arguing, the Court ends up repudiating a legal construction that equates fatherhood to just breadwinning. Rather, it seems to support the ideology of 'new fatherhood' and a dual-earner/dual-carer family model, the latter of which presupposes an overlap of (traditionally gendered) roles and is achievable through effective family-work reconciliation.

¹²⁹² *Markin v Russia* (Grand Chamber), Partly Concurring, Partly Dissenting of Judge Pinto de Albuquerque, under the section 'The nature of the right to parental leave'.

¹²⁹³ *Ibid.*

¹²⁹⁴ *Ibid.* The concurring judge goes on by specifying certain criteria that Contracting States should, in his view, obey when undertaking their positive obligation to provide for a system of parental leave. Firstly, the right to parental leave should be made available to every citizen, irrespective of sex or professional status. Secondly, legislation should provide for a minimum content concerning the form, the duration and the conditions of parental leave. Thirdly, the provision of parental leave is an obligation of result, which the State is required to meet within a reasonable amount of time through adequate legislative measures.

¹²⁹⁵ Timmer, 'Toward an Anti-Stereotyping Approach', 712.

¹²⁹⁶ Timmer, 'From Inclusion to Transformation', 157.

3. Concluding Remarks: Departing from a Gendered Division of Labour, Adding a Layer to Conventional Fatherhood

The Court has shown itself to be aware of the importance of distinguishing between maternity leave and parental leave, since the very beginning. Despite declaring mothers and fathers ‘similarly placed’ with respect to childcare since *Petrovic v Austria*, the explicit overcoming of a gendered division of labour is accomplished only in the landmark case of *Markin v Russia*. Although a violation of Article 14 taken in conjunction with Article 8 was already found in the decision of *Weller v Hungary*, the latter fails to undertake an anti-stereotyping analysis and, therefore, delivers an outcome which, only implicitly, departs from the conventional definition of fatherhood and, supposedly, leaves the conventional definition of motherhood untouched. In other words, in the judgment of *Weller*, the Court begins to “bring men into the frame” through what Fredman calls a “levelling up option” – which consists in extending women’s parenting rights to fathers.¹²⁹⁷ However, it is only in the judgment of *Markin* that the Court discards references to a gendered division of labour as insufficient justification of discrimination and, explicitly, overcomes the images of the man-breadwinner and the woman-homemaker as determining the allocation of the right to parental leave.

Therefore, the full adoption of an anti-stereotyping approach proved fundamental to move beyond the father’s situation and grasp the double-edged nature of the man-breadwinner/woman-homemaker stereotype, although not yet in its fullest sense. Nonetheless, the right to parental leave is still constructed according to an adult-centric vision of parenting. In other words, even in the progressive judgment in *Markin*, this right is framed in the interests of fathers to be involved in the care of their children and in the interests of women to enter the workplace or to continue to be employed, but not in the interests of the child to be cared for by their parents. Similarly, although being applicants, in the case of *Weller*, the children were recognised victims of a violation of Article 14 taken in conjunction with Article 8, but on different grounds, namely the nationality of their mother.

Having overturned the traditional distribution of roles between men and women, it seems interesting to identify the successor(s) of breadwinning/economic provision in the legal definition of fatherhood endorsed by the Court. Once again, the conventional feature under scrutiny –

¹²⁹⁷ Fredman, ‘Reversing Roles’, 442.

although put under serious challenge by social transformations – is not completely abandoned within the Court’s jurisprudence, but rather it coexists (in tension) with the emerging image of the ‘father as carer’.¹²⁹⁸ Therefore, also in this case-law domain, the Court ends up supporting the complex image of the ‘new father’, which encloses both change and continuity. According to the emerging definition, a father does not abandon his traditional role as provider, but rather combines it with nurturing responsibilities through the take-up of parental leave.

Furthermore, in supporting the combination of parental and professional responsibilities within fatherhood as essential in order to ensure a similar arrangement for mothers, the Court accepts the reality of fragmented fatherhood, which, in this particular context, consists in a more equal split of breadwinning and childcare responsibilities between men and women. The Court seems to suggest that nurture is no longer the sole responsibility of mothers and breadwinning functions no longer fall within men’s exclusive competence. The Court is of the opinion that policies that make parental leave entitlements available to both men and women are to be fostered, as they facilitate a fair fragmentation of childcare and professional roles – traditionally performed along gendered lines – between mothers and fathers. In this domain, therefore, the acceptance of fragmented fatherhood is conducive to the normatively desirable dual-earner/dual-carer family model. Concerning fatherhood’s other conventional features, all the applicants were the biological fathers and, with the questionable exception of Mr Markin, all married to the child’s mother. However, whether their conventionality made a difference to the outcome of their claims cannot be established.

Finally, it is worth emphasising the role played by the rule of consensus in determining the endorsement of this (partially) new definition. This jurisprudence displays a regular use of the doctrine of the margin of appreciation inasmuch as it confirms a relationship of indirect proportionality between the width of the margin of appreciation enjoyed by States and the width of the consensus among the States within the Council of Europe. In the case of *Petrovic v Austria*, the Court observed that, at the end of the 1980s, States had gradually started to provide for parental leave to fathers, (and not only to mothers), in line with a more equal sharing of childcare responsibilities between men and women in society. Despite these evolving societal and legal realities, however, at the material time, there was no European common ground between the laws

¹²⁹⁸ R. Collier and S. Sheldon, *Fragmenting Fatherhood: A Socio-Legal Study* (Hart, 2008), 136.

of the Contracting States and, therefore, the State was considered to enjoy a wide margin of appreciation.

Arguably, the case of *Weller v Hungary* operates as a good transition in the process of establishing a common European standard and, as such, contributes to legitimising the decision to overturn the *Petrovic* judgment in the case of *Markin v Russia*. As mentioned above, the reliance on the existence of an “emerging consensus” justifies the award of a narrower margin of appreciation and, consequently, the application of a stricter standard of review. As a result, even if no common ground exists yet, the Hungarian authorities’ refusal to grant the applicant ‘maternity benefits’ is found incompatible with the Convention as a result of the magnifying effect of Article 14. The status of consensus maintains its relevance in the judgment of *Markin v Russia*, namely at the time where its formation is completed.¹²⁹⁹ Therefore, it would seem that the employment of Article 14 to also cover those additional rights voluntarily provided by the State played only a temporary role in determining whether a violation had occurred. Indeed, as soon as the Court could establish that the majority of States provided for parental leave to both men and women and, more importantly, to both servicemen and servicewoman, it no longer felt the need to state that, whenever States go beyond the Convention requirements, they cannot apply additional rights in a discriminatory manner.

The existence of an established European standard eventually worked as an empowering tool in the Court’s jurisprudence. It was used as a solid basis thereby challenging discriminatory provisions and departing from a conventional understanding of fatherhood as solely related to economic provision. The important weight attached to consensus reveals the Court’s willingness to respect national choices and, more generally, its conception of the Convention as a means of reflecting the legal realities of the Contracting States, more than pushing for legal change at the domestic level. Apparently, it is social change and, eventually, legal change at the national level that prompt and legitimise the undertaking of an anti-stereotyping approach at the Strasbourg level and, accordingly, an interpretation of the Convention provisions that departs from the national choice of the Respondent State.

¹²⁹⁹ Moreover, different from the previous two decisions, the rule of consensus is applied with methodological strictness. Indeed, both the Chamber and the Grand Chamber established that a vast majority of European States had enacted legislation providing for parental leave to both parents (in both the civilian and the army contexts) on the basis of accurate comparative data.

However, the Court does not seem to have made the most out of the existence of a solid European consensus. Indeed, as suggested by Judge Pinto de Albuquerque, the existence of a shared approach in the field could have been relied on to call for a dynamic interpretation of Article 8. This, in turn, would have led to the construction of the right to parental leave as an integral component of the right to respect for family life and, therefore, as a right *per se*. Indeed, as previously mentioned, to date, the right to parental leave is considered worthy of protection under Article 8, only inasmuch as there is a discriminatory dimension at stake. This limited understanding of the right to parental leave, coupled with the Court's demonstrated tendency to anchor its interpretation to established – rather than new – conditions, makes it clear that the Court is definitely not a forerunner in the domain of family-work reconciliation. Rather, having regard to some national standards – as in Sweden – the Court is certainly lagging behind. Given the currently parasitic nature of the right to parental leave, it is unimaginable that the Court will affirm a positive obligation to provide for gender-specific provisions, like the Swedish 'daddy month', any time soon.

CHAPTER 5 – The Normative Force of Heterosexuality: How Far is it Contested?

Introduction

This chapter investigates the extent to which heteronormativity continues to shape the Court's jurisprudence involving (prospective) homosexual parents and, more specifically, fathers. Section 1 provides an overview of the national trends towards the recognition of homosexual individuals in their capacity as partners and parents. In so doing, it underlines that these two types of recognition do not usually move along together; rather, the conferral of partnership rights tends to precede the opening of family avenues. Apart from demonstrating that the same dynamic has driven the development of the Court's jurisprudence, Section 2 puts the Court's adherence to heteronormative standards to the test by providing a critical analysis of the limited, but meaningful case-law pertaining to homo-parenthood. Finally, Section 3 attempts to mainstream the principal findings of the investigation, thus offering a tentative answer to the various research sub-questions.

1. National Responses: Two Distinct Stages of Development – Partnership Rights and Parental Rights

Compared to other unconventional family arrangements, the emergence of same-sex unions has challenged the traditional paradigm of the family in a more holistic way. Apart from constituting a conventional feature of fatherhood itself, heterosexuality often represents a prerequisite for the existence of other conventional characteristics. While unmarried families deviate from the conventional model of partnership and parenting due to their non-marital nature, the biological link – regardless of its sufficiency or not – served as a *trait d'union* between the ideal and the alternative. Similarly, when discussing the employment of ARTs by heterosexual couples, despite the partial/full departure from biology, their adherence to a different-sex, bi-parental model of parenting has been relied on for inclusive purposes. Conversely, within the domain of homosexuality, the chances to mimic the traditional family are significantly lower. The typical 'as if' attitude of the law has a limited, if any at all, margin of operation in the terrain of homosexual families.

Lesbian and gay families, together with adoptive, foster and step-families, constitute a further manifestation of the on-going fragmentation of parenthood. Same-sex couples' lack of reproductive sufficiency inevitably challenges the conventional biological paradigm and leads to scenarios involving more than two individuals fulfilling complementary parental functions. Consider, for instance, a lesbian couple willing to conceive a child through an anonymous sperm donor. In such situation, three adults will be involved - more or less directly - in the reproductive process: the two women and the male sperm donor. Therefore, the resulting child will have two biological parents, one of whom is also performing nurturing activities and two social parents, one of whom is genetically unrelated. However, in most national jurisdictions, only one of them will be recognised as a legal parent of the child, namely the biological mother. Similar to the possibly unknown biological father, but for a different reason, the second nurturing parent might remain a legal stranger to the child.

The discrepancy between legal and social realities emerges even more clearly when the prospective parents are a gay male couple. One available reproductive option is surrogacy: according to its traditional method, the surrogate mother is pregnant with her own biological child and the sperm is donated by one of the intended fathers, namely one of the gay male partners. Following the conventional rules regulating filiation, in similar circumstances, parturition, rather than biological relatedness, makes the surrogate mother the legal mother of the child. The identification of the legal father can follow illogical routes: should the surrogate be married, her husband will be recognised as the legal father of the child regardless of their biological unrelatedness. Otherwise, legal fatherhood will be attributed to the biological father, who acts as a parent to the child in accordance with his pre-conception intention. Therefore, the application of those rules, which were created to regulate the 'conventional family', points to marriage (as opposed to biology) as the primary locus of fatherhood in surrogacy situations, unless otherwise agreed in a valid contract.

The other parenthood route available to homosexuals is adoption, which – as already ascertained in relation to heterosexual couples – departs from the conventional rule of biology and challenges the bi-parental structure of the conventional family. This becomes particularly evident in cases of second-parent adoption, namely where one's homosexual partner wishes to adopt the former's child born out of his previous heterosexual relationship or via ART. In such scenario, the

child will be predictably exposed to a multi-parental environment: two biological and, possibly, legal parents, one of which is also acting as a nurturing parent, and an additional nurturing parent.

These points of disjuncture between the conventional family and homosexual families explain why, even in the most broad-minded societies, the inclusion of same-sex couples within a legal framework of the family has only taken place progressively and in a fragmented fashion.¹³⁰⁰ A general trend reveals that legal recognition of same-sex couples has gone through – or, is about to go through – two stages of development, in most jurisdictions. The first phase is characterised by the recognition of same-sex couples as couples,¹³⁰¹ and, therefore, implies the extension of partnership rights traditionally conferred on heterosexual couples to their homosexual counterparts. At this stage, the most visible demand for recognition relates to access to the institution of marriage or to a formal marriage-like relationship status, like civil partnership.¹³⁰² The second phase, which is more relevant for current purposes, focuses on the legal recognition of homosexual individuals and couples as parents and, as such, consists in conferring parental status or parental rights on them.¹³⁰³ In the past, children of homosexual parents tended to arise primarily from previous heterosexual relationships.¹³⁰⁴ In contemporary times, the opportunities opened up by ART and increased access to adoption have made homo-parenthood¹³⁰⁵ increasingly detached from heterosexuality.¹³⁰⁶ Yet, this second dimension of legal recognition is still ‘on the way’ in most European countries. Indeed, despite a rapid and heightened legal recognition of same-sex

¹³⁰⁰ M. Jantera-Jareborg, ‘Parenthood for Same-Sex Couples – Scandinavian Developments’ in K. Boele-Woelski and A. Fuchs (eds.), *Legal Recognition of Same-Sex Relationships in Europe – National, Cross-Border and European Perspectives* (Intersentia, 2012), 91.

¹³⁰¹ *Ibid.*, 92.

¹³⁰² On processes that led to the legal recognition of same-sex relationships in Canada, the UK, New Zealand and Australia, see L. McNamara, *Human Rights Controversies – the Impact of Legal Reform* (Routledge, 2007), chapter 3 ‘Pushing the boundaries of human rights protection: Equality and the recognition of same-sex relationships’. On the formalisation and legal consequences of same-sex marriages and partnerships in European countries, see Part I in K. Boele-Woelski and A. Fuchs (eds.), *Legal Recognition of Same-Sex Relationships in Europe – National, Cross-Border and European Perspectives* (Intersentia, 2012), 91; otherwise, for a less recent but world-wide perspective, see R. Wintemute and M. Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships – A Study of National, European and International Law* (Hart, 2001).

¹³⁰³ Jantera-Jareborg, ‘Parenthood for Same-Sex Couples’, 92.

¹³⁰⁴ *Ibid.*, 119.

¹³⁰⁵ Among others, Ruspini defines ‘homo-parenthood’ as “denoting a situation in which at least one adult refers to him or herself as homosexual who is or wishes to be a father or mother of at least one child”. See E. Ruspini, *Diversity in family life – Gender, Relationships and Social Change* (Policy Press, 2013), 144.

¹³⁰⁶ *Ibid.*

relationships, the main differences between marriage and registered partnership laws are likely to concern children-related matters.¹³⁰⁷

French legislation – more specifically, its evolution and current state – provides a good example of the above two stages of development. In November 1999, a campaign for legal recognition of same-sex relationships culminated in the creation of a new form of conjugal relationship under the law, namely the *Pacte civil de solidarité* (PACS). Once the law on the PACS was enacted, however, the struggle for the equality of same-sex couples was not over. Indeed, a PACS did not allow the partners to jointly adopt a child, nor to be granted joint parental authority over the biological child of one of them or to have access to ART.¹³⁰⁸ This further step has been only partially taken in May 2013, when France legalised same-sex marriage and allowed homosexual couples to jointly adopt children. Nonetheless, full equality continues to have a long way to go.¹³⁰⁹ For instance, access to ART remains a privilege of heterosexual couples and surrogacy is still unlawful.¹³¹⁰ Moreover, homosexual couples are still excluded from the benefit of the presumption of co-parenthood and, therefore, have to initiate an intra-family adoption process.¹³¹¹

Even in the Nordic countries – which were the first in the world to expand the traditional boundaries of family law to include same-sex relationships and families¹³¹² – differences in treatment between same-sex couples and their heterosexual counterparts persist to date. Under the lead of Denmark, the Scandinavian countries have enabled the formalisation of same-sex relationships through the institution of registered partnership since the late 1980s.¹³¹³ According to these regulations, same-sex couples, who had registered their relationships were subject to the rules of marriage, but with some exceptions. In the period between 1999 and 2003, legal reforms

¹³⁰⁷ N. Polikoff, 'Recognising Partners but Not Parents/Recognising Parents but Not Partners: Gay and Lesbian Family Law in Europe and the United States' 2000-2001 17 *New York Law School Journal of Human Rights* 712. Moreover, legal summaries country-by-country are provided by ILGA Europe and available at http://www.ilga-europe.org/home/guide_europe/country_by_country last access on 24th April 2013.

¹³⁰⁸ B. Perreau, *The Politics of Adoption – Gender and the Making of French Citizenship* (The MIT Press, 2014), 31-34; D. Borrillo, 'The "Pacte Civil de Solidarité" in France: Midway between Marriage and Cohabitation' in R. Wintemute and M. Andenaes (eds.), *Legal Recognition of Same-Sex Partnerships* (Hart, 2001), 475-492.

¹³⁰⁹ Perreau, 'The Politics of Adoption', x.

¹³¹⁰ *Ibid.*

¹³¹¹ *Ibid.*

¹³¹² Jantera-Jareborg, 'Parenthood for Same-Sex Couples', 94.

¹³¹³ For details on the reform processes undertaken in the Nordic countries, see H. Frioriksdottir, 'The Nordic Model: Same-Sex Families in Love and Law' in D. Gallo, L. Paladini and P. Pustorino (eds.), *Same-Sex Couples, before National, Supranational and International Jurisdictions* (Springer, 2014), 161-180; on Europe more widely, see N. Polikoff, 'Recognising Partners but Not Parents', 719-730.

in Norway, Sweden, Iceland and Denmark removed the original exclusion of registered partnerships from the rights of joint parenthood and allowed second-parent adoption.¹³¹⁴ Joint adoption turned out to be a much more divisive issue.¹³¹⁵ To date, same-sex registered partners are permitted to jointly adopt a child only in Sweden, Iceland and Denmark.¹³¹⁶ In Norway, the right to joint adoption is reserved to homosexual married couples, while it remains unrecognised in Finland.¹³¹⁷

Unlike in the other Nordic countries, which replaced the option of registered partnership with a gender-neutral marriage concept between 2009 and 2012, in Finland, this reform will become effective only in March 2017. Therefore, registered partnerships will remain the only viable means of formalisation of same-sex relationship until then. Notwithstanding the current status, homosexual registered partners are entitled to second-parent adoption since 2009. Finally, as a further product of same-sex marriage reforms, lesbian couples were accorded access to ART and to rights to co-parenthood in Norway and Iceland.¹³¹⁸ Differently, in Denmark and Finland, rights to co-parenthood do not automatically follow from ART. Therefore, lesbian couples are required to apply for second-parent adoption.¹³¹⁹

Taking the best interests of the child into account has played a fundamental role in preventing, slowing down or constraining the process of attaching legal recognition to homoparenthood. Opponents to gay adoption and access to ART by homosexuals have commonly put forward three main lines of argument.¹³²⁰ Firstly, they have claimed the unsuitability of lesbians and gay men as parents and the inevitable harm inflicted by their sexual orientation and associated lifestyle on children's cognitive and emotional development, gender identity and sexual

¹³¹⁴ Jantera-Jareborg, 'Parenthood for Same-Sex Couples', 102. According to some commentators, the previous exclusion from the possibility to adopt children expressed the belief that children should be raised in a heterosexual dual-parental family. See, *inter alia*, L. Nielsen, 'Family Rights and the 'Registered Partnership' in Denmark' 1990 4 *International Journal of Law, Policy and the Family* 305.

¹³¹⁵ Jantera-Jareborg, 'Parenthood for Same-Sex Couples', 104.

¹³¹⁶ *Ibid*, 105.

¹³¹⁷ *Ibid*.

¹³¹⁸ *Ibid*, 115.

¹³¹⁹ *Ibid*, 111.

¹³²⁰ J. Tobin and R. McNair, 'Public International Law and the Regulation of Private Spaces: Does the Convention on the Rights of the Child Impose an Obligation on States to allow Gay and Lesbian to Adopt?' 2009 23 *International Journal of Law, Policy and the Family*, 119. One of the most active (and cited by politicians) commentators who opposed placement of children in homosexual families is Lynn Wardle. See, for instance, L. Wardle, 'The Potential Impact of Homosexual Parenting on Children' 1997 *University of Illinois Law Review* 833-920. For a critical assessment of all the different lines of argument put forward by opponents to placement of children with homosexuals, see M. Wald, 'Adults' Sexual Orientation and State Determinations Regarding Placement of Children' 2006-2007 40 *Family Law Quarterly* 381-434.

orientation.¹³²¹ Secondly, some commentators have relied on and perpetuated sex role stereotypes, which prescribe differentiated parenting roles for women and men, and insisted that children need a (real) father and a (real) mother actively involved in their lives.¹³²² Thirdly, it has been argued that children raised by homosexuals are more likely to be exposed to social stigma and discrimination and less able to establish positive social relationships.¹³²³ Against such opposition, it is often emphasised that comparative research has consistently documented the mental health and parenting skills of homosexual parents and the lack of any difference between children raised by homosexual parents and those raised by heterosexual parents, in terms of social, psychological and gender development.¹³²⁴ In a nutshell, existing literature strongly indicates that the wellbeing of children does not depend on the sexual orientation of their parents, but rather on the quality of family ties, the character of daily interactions and the emotional strength of their relationships with their parents.¹³²⁵

Therefore, social and legal hostility towards homosexuality can be understood as a reaction to the breach of gender norms and, more specifically, as an attempt to preserve conventional understandings of masculinity and femininity.¹³²⁶ In this regard, gay fathers face considerably more challenges than lesbian mothers. Firstly, there is a remarkable gap in the literature concerning the experience of children living with gay fathers (if compared to the research evidence on the experience of children living with lesbian parents) and, therefore, less is known about them.¹³²⁷ Moreover, fathers are more likely to be affected by harmful stereotypes about gay men and parenting and, *inter alia*, have shown complex issues in relation to ‘coming out’ with their children and partners, such as fear of homophobia on the latter’s side.¹³²⁸ Furthermore, although the same-

¹³²¹ Tobin and McNair, ‘Public International Law and the Regulation of Private Spaces’, 119.

¹³²² *Ibid*; E. Meyer, ‘Gay Fathers: Disrupting Sex Stereotyping and Challenging the Father-Promotion Crusade’ 2011 22(2) *Columbia Journal of Gender and Law* 479-529.

¹³²³ Tobin and McNair, ‘Public International Law and the Regulation of Private Spaces’, 119.

¹³²⁴ See, *inter alia*, R. Scallen, ‘An investigation of parental attitudes and behaviour in homosexual and heterosexual fathers’ 1982 42 *Dissertation Abstract International* 9-B; S. Golombok, A. Spenser, M. Rutter, ‘Children in lesbian and single-parent households: psychosexual and psychiatric appraisal’ 1983 24(4) *Journal of Child Psychology and Psychiatry* 551-572; J. Bigner and R. Jacobsen, ‘Parenting behaviours of homosexual and heterosexual fathers’ in F. Bozett (ed.), *Homosexuality and the family* (Harrington Park Press, 1989), 173-186; C. Patterson, ‘Children of lesbian and gay parents’ 2006 15(5) *Current Directions in Psychological Science* 241-244. However, significant methodological concerns and challenges have been identified. See Tobin and McNair, ‘Public International Law and the Regulation of Private Spaces’, 116-119.

¹³²⁵ Ruspini, ‘Diversity in Family Life’, 121.

¹³²⁶ S. Law, ‘Homosexuality and the Social Meaning of Gender’ 1988 *Wisconsin Law Review* 187.

¹³²⁷ Tobin and McNair, ‘Public International Law and the Regulation of Private Spaces’, 12; Ruspini, ‘Diversity in Family Life’, 122.

¹³²⁸ Ruspini, ‘Diversity in Family Life’, 122.

sex composition of the couple evidently brings the traditional division of labour along gendered lines into question, gay fathers have to face the notion that women have stronger caring and parenting abilities than men and, therefore, only the former should be engage in nurturing.

As an additional challenge, available parenthood routes are unquestionably more limited for gay men, compared to lesbians. Whilst lesbians can resort to the relatively uncomplicated and affordable option of donor insemination, surrogacy – when lawful – poses, *inter alia*, great economic barriers to gay men pursuing parenthood.¹³²⁹ Similarly, co-parenting arrangements – in which, for instance, a lesbian conceives and gives birth to a child genetically related to a gay man, under the agreement that the child will be raised jointly and, possibly, together with their respective partners – have proved a difficult choice, in light of the emotional and legal challenges they trigger.¹³³⁰ As a result, adoption tends to be the most common parenting choice for gay men.

2. The ECtHR: The Late and Partial Inclusion of Homosexual Relationships within the Scope of Family Life

Homosexuality departs from the conventional ideology of fatherhood and, more generally, of the family in three major ways. Firstly, the homosexual nature of the relationship impedes natural reproduction. Therefore, the means through which same-sex couples can have a child – namely, adoption, ART and surrogacy – prescind from the biological contribution of either one or both parents. Secondly, within the perimeter of Western Europe, only eleven States permit same-sex couples to marry.¹³³¹ Although a number of legal systems provides for the institution of registered partnership, homosexual relationships remain largely incapable of formalisation under the law.

As a result, neither biology nor marriage can be relied on as grounds to allocate parental status and parental rights to gay fathers. Moreover, same-sex relationships undermine the assumption that personal attributes, such as dominance and nurturance, are determined by and

¹³²⁹ On the issues faced by gay men seeking to have children through surrogacy, see A. Goldberg, *Gay dads: Transitions to adoptive parenthood* (NYU Press, 2012); W. Norton, N. Hudson and L. Culley, 'Gay men seeking surrogacy to achieve parenthood' 2013 27 *Reproductive BioMedicine Online* 271-279.

¹³³⁰ A. Goldberg and A. Moyer, 'Adoption: Lesbian and Gay Adoptive Parents' in *Encyclopedia of Social Work* (National Association of Social Workers Press and OUP), published online in February 2014 – available at <http://socialwork.oxfordre.com/view/10.1093/acrefore/9780199975839.001.0001/acrefore-9780199975839-e-1132#acrefore-9780199975839-e-1132-bibItem-0023> (last access on 4 April 2015).

¹³³¹ Belgium, France, Spain, the UK, the Netherlands, Luxembourg, Denmark, Iceland, Sweden, Portugal, Norway.

‘naturally’ associated to one sex or the other.¹³³² Moller Okin has argued that same-sex couples might offer a “particularly good model of parenthood” because, among others things, they are “far less likely than heterosexual families to practice anything resembling a gendered division of labour”.¹³³³ This perception is substantiated by empirical research pointing to a more equal sharing of paid work and unpaid work in lesbian families.¹³³⁴

The above-mentioned two stages of development can be detected also within the Court’s jurisprudence. The early case-law involving homosexual couples or individuals was primarily concerned with defining the partnership rights of the applicants. The Court was called to enter the terrain of homo-parenthood only in 1999 and, since then, only five cases have been brought by homosexuals seeking to obtain parental status and parental rights. While the case of *Salgueiro da Silva Mouta v Portugal* concerned the refusal of parental responsibility to an homosexual man living with another man, the following four cases – *Fretté v France* (single-parent adoption by a single homosexual man), *E.B. v France* (single-parent adoption by a lesbian living together with her female partner), *Gas and Dubois v France*¹³³⁵ (second-parent adoption) and *X and Others v Austria*¹³³⁶ (second-parent adoption) arose from requests for single-parent and second-parent adoption.

Although the last three judgments concern lesbian women and, as such, do not directly contribute to the debate around conventional fatherhood, their analysis is still useful to shed light on the bigger picture regarding the tenacity of heterosexuality as an essential parameter of legal parenthood. In particular, since the cases of *Fretté v France* and *E.B. v France* stemmed from similar factual circumstances and raised the same legal question, the two judgments offer the chance to compare the legal treatment accorded to lesbian and gay single prospective adoptive parents, respectively, *vis-à-vis* requests for single-parent adoption. The same comparison cannot be undertaken in relation to second-parent adoption since both available cases – namely, *Gas and Dubois v France* and *X and Others v Austria* – concerned a lesbian couple. However, the latter

¹³³² Law, ‘Social Meaning of Gender’, 196.

¹³³³ S. Moller Okin, ‘Sexual Orientation and Gender: Dichotomizing Differences’ in D. Estlund and M. Nussbaum (eds.), *Sex, Preference and Family – Essays on the Law and Nature* (OUP, 1997), 54.

¹³³⁴ Studies providing such evidence are discussed in G. Dunne (eds.), *‘Living Difference’ – Lesbian Perspectives on Work and Family Life* (Harrington Park Press, 1998).

¹³³⁵ *Gas and Dubois v France*, Application no. 25951/07, 15 March 2012.

¹³³⁶ *X and Others v Austria*, Application no. 19010/07, 19 February 2013 (Grand Chamber).

will provide interesting insights as to the persistence of a heteronormative understanding of marriage within the Court's jurisprudence.

A further and – more substantial – manifestation of the above-mentioned two stages of development is constituted by the “underdevelopment of the ‘family life’ limb of Article 8” in the terrain of homosexuality.¹³³⁷ The Court has for a long time understood homosexuality as an essentially private manifestation of human personality and, therefore, has failed to analyse a wide array of matters relating to same-sex relationships through the lens of family life.¹³³⁸ The “privatisation of homosexuality”¹³³⁹ has been rightly interpreted as an attempt by the Court to preserve a strong heteronormative definition of the family.¹³⁴⁰ At the same time, however, according autonomy to private life has enabled the Court to assert that partnership rights exist also outside the conventional family context.¹³⁴¹

The Court's heteronormative definition of family life was left unquestioned for almost three decades, until when the Court accepted that a same-sex couple is capable of establishing family life for the purposes of Article 8 in the landmark decision of *Schalk and Kopf v Austria*.¹³⁴² This jurisprudential advancement was justified on the basis of the following argument:

[A] rapid evolution of social attitudes towards same-sex couples has taken place in many member States. [...] In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8. Consequently the relationship of the applicants, a cohabitating same-sex couple living in a stable de facto partnership, falls within the notion of “family life”, just as the relationship of a different-sex couple in the same situation would.”¹³⁴³

Prior to this judgment, the Court had repeatedly excluded that the emotional and sexual relationship of a same-sex couple constituted family life – even in cases of long-term cohabitation

¹³³⁷ P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2013), 113.

¹³³⁸ *Ibid.* See, *inter alia*, *X and Y v UK*, Application no. 9369/81, 3 May 1983 (Commission); *C. and L.M. v UK*, Application No. 14753/89, 9 October 1989 (Commission); *Mata Estevez v Spain*, Application no. 56501/00, 10 May 2001; *Karner v Austria*, Application no. 40016/98, 24 July 2003; *Fretté v France*, Application no. 36515/97, 26 February 2002 (later analysed in detail).

¹³³⁹ Johnson, ‘Homosexuality and the ECtHR’, 120.

¹³⁴⁰ *Ibid.*, 113.

¹³⁴¹ *Ibid.*

¹³⁴² *Schalk and Kopf v Austria*, Application no. 30141/04, 24 June 2010.

¹³⁴³ *Ibid.*, paras 93-94.

– in contrast to its own jurisprudence involving unmarried families.¹³⁴⁴ Furthermore, it had even declared discrimination on grounds of sexual orientation compatible with Article 14, in light of “the special protection to be afforded to the traditional family”.¹³⁴⁵ In light of this past, the decision in *Schalk and Kopf v Austria* was perceived as a milestone in the process of ensuring equal enjoyment of family rights to homosexual couples by signalling the adoption of a more consistent approach to non-traditional families and alleviating the pre-existing hierarchy between unmarried heterosexual couples and their homosexual counterparts.

However, its revolutionary potential was dramatically reduced by the lack of any definition of the elements that entailed the finding of ‘family life’ in the case under scrutiny.¹³⁴⁶ As emerging from the above quote, cohabitation appears the only aspect of the applicants’ relationship that the Court took into account. However, previous jurisprudence demonstrated that living together in a stable partnership did not *per se* entail the full protection of Article 8. Moreover, as to the issue of whether access to marriage was a prerequisite to the applicants’ effective enjoyment of their family rights, the Court concluded that Contracting States were not obliged to either extend marriage rights to same-sex couples or provide them with alternative modes of recognition - at least, not for now but possibly in the near future.¹³⁴⁷ Indeed, the Court held, “the area in question must (...) still be regarded as one of the evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes”.¹³⁴⁸

The situation, however, seems to have changed. In the case of *Oliari and Others v Italy* – which was decided in July 2015 – the Court found that Italy had failed to fulfil its obligation to ensure that the applicants – three gay couples – could avail themselves of a specific legal framework providing for the recognition and protection of their union, thus violating their right to

¹³⁴⁴ *Ibid*, para 92. Concerning heterosexual couples, see *Jonhston v Ireland* (Application no. 9697/82, Commission Decision of 18 December 1986): non-married heterosexual partners living together in a stable relationship with a child constitute a family under Article 8 (as previously established in *Marckx*); *Kroon and Others v the Netherlands* (Application no. 18535/91, 27 October 1994): same as above, cohabitation as a decisive component of family life.

¹³⁴⁵ *C. and L.M.*, para 2.

¹³⁴⁶ N. Bamforth, ‘Families but not (yet) marriages? Same-sex partners and the developing European Convention ‘margin of appreciation’’ 2011 (23) *Child and Family Law Quarterly* 137.

¹³⁴⁷ *Schalk and Kopf*, paras 60-61. For a critical assessment of this judgment, see L. Hodson, ‘Ties That Bind: Towards a Child-Centred Approach to Lesbian, Gay, Bisexual and transgender Families under the ECHR’, (2012) 20 *International Journal of Children’s Rights*, 513. See also L. Hodson, ‘A Marriage by Any Other Name? *Schalk and Kopf v Austria*’ (2011) 11(1) *Human Rights Law Review*, 176; H. Lau, ‘Rewriting *Schalk and Kopf*: shifting the locus of deference’ in E. Brems (ed.), *Diversity and Human Rights: Rewriting Judgments of the ECHR* (CUP, 2013), 244.

¹³⁴⁸ *Schalk and Kopf*, para 105.

respect for family life.¹³⁴⁹ The Court noted that there was a tension between the social reality of the applicants, who had for the most part openly lived their relationship in Italy, and the legal reality of non-recognition. Along the lines of its judgment in *Shalk and Kopf v Italy*, inspiration was drawn from the situation in the countries of the Council of Europe, where the Court could observe a trend towards legal recognition: 24 of the 47 States have legislation which provides for such recognition.¹³⁵⁰ It further observed that the Constitutional Court had underlined the need for legislation to recognise and protect same-sex unions on several occasions and that, according to recent surveys, such recognition was supported by a majority of the Italian population.¹³⁵¹ In light of these, the Court held that, in order to find a non-violation of Article 8, it would have had to ignore the changing conditions in Italy and would have had to be reluctant to apply the Convention in a practical and effective manner.¹³⁵²

Apart from delaying the entry of homosexual couples into the realm of family life, the Court's early jurisprudence related to homosexuality refused to investigate the discrimination complaint brought by the applicants, arguing that the issues raised under Article 14 had already been considered by finding a violation of Article 8.¹³⁵³ The recognition of sexual orientation as a ground protected by Article 14 through the judgment in *Salgueiro da Silva Mouta v Portugal* signalled a change in the Court's attitude, but only to a certain extent. Indeed, having regard to the latest judgment against Italy, the Court seems to have fallen back into old habits.¹³⁵⁴ However, as pointed out by Nikolaidis, addressing cases of systemic disadvantage and stereotyping through Article 8 has proved useful for stressing that anti-discrimination does not merely consist in treating individuals similarly.¹³⁵⁵ Rather, it is more widely about enabling an individual to conduct his/her own life without being exposed to oppression and disadvantage on the basis of his/her personal characteristics.¹³⁵⁶

¹³⁴⁹ *Oliari and Others v Italy*, Applications no. 18766/11 and 36030/11, 21 July 2015. Even before, see *Vallianatos and Others v Greece* (Applications no. 29381/09 and 32684/09, 7 November 2013), where the Court held that Greece had failed to provide convincing reasons for justifying the exclusion of same-sex couples from the institution of civil union, thus violating Article 14 taken in conjunction with Article 8.

¹³⁵⁰ *Oliari and Others*, para 55.

¹³⁵¹ *Ibid*, paras 180-181.

¹³⁵² *Ibid*, para 186.

¹³⁵³ C. Nikolaidis, *The Right to Equality in European Human Rights Law – The quest for substance in the jurisprudence of the European Courts* (Routledge, 2015), 59.

¹³⁵⁴ See *Oliari and Others*, para 188.

¹³⁵⁵ Nikolaidis, 'The Right to Equality', 59.

¹³⁵⁶ *Ibid*.

One of the principal *foci* of the following jurisprudential analysis is a consideration of whether the Court supports or challenges heteronormativity, in the cases brought by gay (prospective) fathers. In other words, it seeks to understand the extent to which the ECtHR has succeeded in escaping the normative force of heterosexuality and, therefore, the extent to which the ‘protection of the traditional family’ has been questioned as a legitimate aim for providing a difference in treatment on grounds of sexual orientation. Given that the traditional connectors of fathers to children are likely to be missing, the Court is likely to be left with nurture or nurturing intentions as the only elements to ground the compatibility of the contested decision with the Convention. Therefore, in addition to disclosing the Court’s attachment or departure from heteronormativity, the case-law on homo-parenthood constitutes a unique opportunity for testing the sufficiency of nurture and nurturing intentions in the absence of conventional paternal features.

2.1. *Salgueiro da Silva Mouta v Portugal*:¹³⁵⁷ ‘Violation’, but Still Connected to Heterosexuality

In *Salgueiro da Silva Mouta v Portugal*, the applicant married C.D.S in 1983 and, four years later, their daughter, M. was born. The applicant separated from his wife in April 1990 and has since then started cohabiting with a man, L.G.C. During the divorce proceedings, the applicant signed an agreement with C.D.S. according to which C.D.S. was to have parental responsibility for M. and the applicant a right to contact. However, the applicant was unable to exercise his right to contact because C.D.S. failed to comply with the agreement. Subsequently, the applicant applied for an order giving him parental responsibility for the child, alleging that M. was living with the maternal grandparents. In response to this request, C.D.S. accused the applicant of having sexually abused M. The Family Affairs Court found that, given the mother’s uncooperative behaviour, the father was better able to take care of M.. On the basis of psychological reports, the Court clarified that, in addition to “providing the economic and living conditions necessary to have the child with him”, he had proved capable of “providing her with the balanced conditions she needs and of respecting her right to maintain regular and sustained contact with her mother and maternal grandparents”.¹³⁵⁸

M. had lived with her father for approximately nine months, when she was allegedly abducted by C.D.S. The latter appealed against the Family Affairs Court’s decision to the Lisbon

¹³⁵⁷ *Salgueiro da Silva Mouta v Portugal*, Application no. 33290/96, 21 December 1999.

¹³⁵⁸ *Ibid*, para 12.

Court of Appeal, which overturned the lower court's decision and awarded parental responsibility to C.D.S., with contact to the applicant. The Court of Appeal held, *inter alia*, that “despite the importance of paternal love, a young child needs the care which only the mother's love can provide” and, therefore, custody should “as a general rule” be granted to the mother.¹³⁵⁹ Moreover, it was noted that, even if society was becoming increasingly tolerant of homosexuality:

It cannot be argued that an environment of this kind is the healthiest and best suited to a child's psychological, social and mental development, especially given the dominant model in our society. (...) The child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife.¹³⁶⁰

The right to contact granted to the applicant was never respected by C.D.S.. In connection with the proceedings for the enforcement of the Court of Appeal's decision, the applicant learnt that M. had moved to the North of Portugal. The applicant made two unsuccessful attempts to see his daughter.

Before the ECtHR, the applicant complained that the Court of Appeal's decision to award parental responsibility of M. to the mother because of his sexual orientation amounted to a violation of his right to respect for family life, taken in conjunction with Article 14. On the contrary, the Government argued that Contracting States enjoyed a wide margin of appreciation in settling issues of parental responsibility.¹³⁶¹ Moreover, given the paramount importance to be attached to the child's best interests, it was submitted that national authorities were better placed than an international court.¹³⁶² It was further contended that the Court of Appeal had only taken the child's interests – and not the applicant's sexual orientation – into consideration when reaching the final decision.¹³⁶³ Therefore, in the Government's view, the applicant had not been treated differently from his ex-wife.¹³⁶⁴

As a first step, the Court established that the Court of Appeal's decision amounted to an interference of the applicant's right to respect for family life and, therefore, declared Article 8 applicable. It further observed that “the Convention institutions have held that this provision

¹³⁵⁹ *Ibid*, para 14.

¹³⁶⁰ *Ibid*.

¹³⁶¹ *Ibid*, para 25.

¹³⁶² *Ibid*.

¹³⁶³ *Ibid*.

¹³⁶⁴ *Ibid*, para 27.

applies to decisions awarding custody to one or other parent after divorce or separation”.¹³⁶⁵ However, when assessing compliance with the Convention, the Court chose to consider the complaint exclusively under Article 14, taken in conjunction with Article 8, thus not dealing with the issue under Article 8 in isolation. Moving onto the merits of the case, the Court acknowledged that the child’s interests had been given due regard by the Court of Appeal; however, it was also noted that a new factor, namely the fact that the applicant was an homosexual and was living with another man, was introduced when overturning the decision of the lower court.¹³⁶⁶ As a result, the Court found a difference of treatment between the applicant and the child’s mother on the basis of sexual orientation.

To establish whether it was justified, the Court began by noting that it pursued a legitimate aim, namely the protection of the health and rights of the child.¹³⁶⁷ It went on by observing that, in light of the above excerpts, the references to the applicant’s homosexuality were not “merely clumsy or unfortunate” statements¹³⁶⁸ or mere *obiter dicta* with no impact on the outcome of the case, as suggested by the Government, but rather decisive factors in the final decision.¹³⁶⁹ The Court observed that this conclusion was further substantiated by the fact that, when according him a right to contact, the Court of Appeal advised the applicant to abstain from assuming conduct, which would make the child understand that he was living with another man in a stable relationship.¹³⁷⁰ Therefore, no reasonable relationship of proportionality between the means employed and the goal pursued could be established and the Court found a violation of Article 8 taken in conjunction with Article 14.¹³⁷¹

In this judgment, the Court held the incompatibility of a refusal to award parental responsibility based on considerations regarding the applicant’s homosexuality with the Convention, thus explicitly including the ground of sexual orientation within the scope of Article

¹³⁶⁵ *Ibid*, para 22.

¹³⁶⁶ *Ibid*, para 28.

¹³⁶⁷ *Ibid*, para 30.

¹³⁶⁸ *Ibid*, para 33.

¹³⁶⁹ *Ibid*, para 35.

¹³⁷⁰ *Ibid*.

¹³⁷¹ *Ibid*, para 36. This conclusion constitutes evidence of the ‘magnifying effect’ of Article 14, as noted by Arnardóttir. More specifically, it shows that Article 14 is applicable when the facts of the case fall within the ambit of another Convention right (Article 8), but whether the latter has been violated is not, at least in principle, a relevant matter. See O. Arnardóttir, ‘Discrimination as a magnifying lens – Scope and ambit under Article 14 and Protocol No. 12’ in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2014), 336.

14.¹³⁷² Although not expressly stated, the Court rejects the reliance on general considerations as a means of adjudicating the allocation of parental rights to homosexuals. Gender stereotypes undoubtedly formed the cornerstone of the Court of Appeal's judgment. As emerging from the above quotes, the refusal of custody to the applicant was heavily informed by two stereotypical notions: the man-breadwinner/woman-homemaker stereotype and the assumption that homo-parenting is not in the child's best interests. Whilst the first falls within the sub-category of sex-role stereotypes (see previous chapter), the second embodies a "compounded stereotype",¹³⁷³ since it is created by the intersection of gender stereotypes with other stereotypes. In this specific instance, the traits of the applicant as a homosexual man and, therefore, his gender and sexual orientation were compounded in a way that denied him the right to custody of M..

In light of this, the anti-stereotyping approach introduced in Chapter 1 becomes a useful tool to evaluate the Court's ability to overcome the conventional ideology of fatherhood, also in this context. Concerning the first phase, the Court named the gender stereotypes at issue, but only implicitly – namely, by referring to the justifications put forward by the Government, in their exact wording, to infer the incompatibility of the difference in treatment suffered by the applicant with the Convention. Although not embarking on all steps of the contesting process (in other words, no weighty reasons test, no stereotypes as insufficient reasons), the Court ultimately contests their validity as sufficient justifications for a difference in treatment by finding a violation of Article 8, taken in conjunction with Article 14. This conclusion, in turn, amounts to denying any legitimate connection between one's sexual orientation and his/her ability to raise a child and, as such, it contributes to challenging the persistence of heterosexuality as a conventional ground for attributing parental right to biological fathers.

Despite its unquestionably progressive character, as argued by Hodson, this judgment is "likely to be of limited relevance for children of LGBT families" and, therefore, for gay prospective fathers.¹³⁷⁴ Indeed, the extent to which the final decision is disconnected from heterosexuality and, therefore, what new or additional factor(s) has/have succeeded in connecting the applicant to his child remain(s) to be ascertained. With the exception of his sexual orientation, the applicant embodies the image of the conventional father: firstly, he is the biological father of

¹³⁷² *Salgueiro*, para 28.

¹³⁷³ R. Cook and S. Cusack, *Gender Stereotyping – Transnational Legal Perspectives* (University of Pennsylvania Press, 2010), 29.

¹³⁷⁴ Hodson, 'Ties That Bind', 511.

the child, with respect to whom he applied for parental responsibility; secondly, he is the ex-husband of the child's mother and M. was born within wedlock; thirdly, as emerging from the Court of Appeal's judgment, he can allegedly financially provide for his child. Therefore, although his homosexuality became a barrier to the attribution of parental responsibility, the father-child relationship at stake concerned a child born within wedlock and his biological father and, as such, "the law could not depart too flagrantly from reality".¹³⁷⁵

At the same time, however, one of the clear messages conveyed is that being non-heterosexual is not seen as amounting to a lack of fitness for fatherhood. Moreover, it is important to point out that, prior to divorce, the applicant had cohabitated with his former wife and M. for almost three years. Moreover, following the lower court's conferral of parental responsibility on the applicant, he had lived with and took care of M. for an additional period of nine months. Furthermore, his caring and parenting abilities had been documented by psychological evidence collected during the proceedings before the lower court and, more importantly, relied on by the same court to rule on the transfer of the parental responsibility of M. from her mother to the applicant. Therefore, although not spelt out by the Court, one could argue that – in the wake of its own jurisprudence pertaining to unmarried fathers – the applicant's 'demonstrated interest and commitment' to his child as well as the existence of close personal ties between them might have influenced the Court's decision, whereby the Court of Appeal's refusal to grant him parental responsibility breached his right to respect for family life, taken in conjunction with Article 14.

2.2 *Fretté v France*:¹³⁷⁶ Heterosexuality Remains Necessary to Become a Legal Father

The applicant, Philippe Fretté, applied for prior authorisation to adopt a child. During his first interview with the psychologist, he revealed he was homosexual and he was strongly urged to refrain from continuing the adoption process. In 1993, the Paris Social Services, Youth and Health Department refused the applicant's request on the ground that he offered "no stable maternal role model" and had "difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child".¹³⁷⁷ It was also stated that: "Mr Fretté has undoubted personal qualities and an aptitude for bringing up children. A child would probably be happy with him. The question is whether his particular circumstances as a single homosexual man allow him to be

¹³⁷⁵ Perreau, 'The Politics of Adoption', 68.

¹³⁷⁶ *Fretté v. France*, Application No. 36515/97, 26 February 2002.

¹³⁷⁷ *Ibid*, para 10.

entrusted with a child.”¹³⁷⁸

An appeal lodged by the applicant was dismissed on the ground that the applicant’s “choice of lifestyle” casted doubts as to his ability to ensure a suitable home for the child from an educational, psychological and family perspective.¹³⁷⁹ In the meantime, Mr Fretté lodged an application for judicial review with the administrative court. The Paris Administrative Court noted that there was no evidence to establish or even suggest that Mr Fretté’s lifestyle could endanger or fail to adequately provide for the life of any child adopted.¹³⁸⁰ Paris Social Services appealed to the *Conseil d’Etat*, which set aside the Administrative Court’s judgment and, as for the merits, dismissed the applicant’s request for prior authorisation. It found that the applicant, “having regard to his lifestyle and despite his clear personal qualities and aptitude for bringing up children, did not provide the requisite safeguards – from an educational, psychological and family perspective – for adopting a child”.¹³⁸¹

Before the ECtHR, the applicant contended that the rejection of his application had implicitly been based exclusively on his sexual orientation.¹³⁸² Since the French legal system allowed for adoption by a single, unmarried parent, Mr Fretté argued that homosexuals and bisexuals were *a priori* excluded from the possibility to adopt on the basis of their sexual orientation, with no regard been given to their individual personal qualities and predisposition to raise a child.¹³⁸³ In light of this, he complained that the refusal of authorisation to adopt had breached his rights under Article 14, taken in conjunction with Article 8.¹³⁸⁴ In response to this, the Government argued that the applicant’s complaint did not fall within the scope of the Convention since Article 8 did not protect mere aspirations – not yet materialised – to found a family.¹³⁸⁵ Moreover, as to the justification for the refusal, the Government explained that, although the expression ‘choice of lifestyle’ did encompass sexual orientation, it included additional elements, which proved the applicant’s inability to provide the child with a suitable environment.¹³⁸⁶

¹³⁷⁸ *Ibid.*

¹³⁷⁹ *Ibid.*, para 11.

¹³⁸⁰ *Ibid.*, para 13.

¹³⁸¹ *Ibid.*, para 16.

¹³⁸² *Ibid.*, para 26.

¹³⁸³ *Ibid.*

¹³⁸⁴ *Ibid.*

¹³⁸⁵ *Ibid.*, para 29.

¹³⁸⁶ *Ibid.*

Having clarified that the Convention does not guarantee a right to adopt, the Court further explained that “the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family”.¹³⁸⁷ Although the Court found that there was no interference with Article 8, it decided to proceed with the claim under Article 14 in light of the fact that French law authorised single persons to adopt but disallowed the applicant from doing so on this of the sexual orientation. Article 14, taken in conjunction with Article 8, was eventually held applicable on the ground that, although no express reference was made to his homosexuality, a detailed examination of the case file showed that that criterion was implicitly, but undeniably, the decisive factor in determining the refusal of Mr Fretté’s application by national courts.¹³⁸⁸

As a following step, the Court was called to establish whether the difference in treatment was discriminatory for the purposes of Article 14, taken in conjunction with Article 8.¹³⁸⁹ According to the first limb of the analysis, the refusal was found to pursue a legitimate aim, namely the protection of the health and rights of children who could be involved in the adoption procedure.¹³⁹⁰ The Court went on to prepare the grounds for ascertaining whether the difference in treatment was justified. In this case, the State was granted a wide margin of appreciation on two grounds.¹³⁹¹ Firstly, it was observed that, although most of the Contracting States abstain from expressly excluding homosexuals from adoption, when the latter is an option for single persons, there is no common ground within the social and legal orders of Contracting States on the issue of adoption by homosexuals and, more generally, the law appears to be going through a “transitional stage”. Secondly, a wide margin of appreciation should be granted as a result of the fact that national authorities benefit from their direct and constant connection with local realities and, therefore, are better placed than an international court to assess local needs and conditions (the ‘better placed’ argument).¹³⁹²

The Court further held that the core issue resonated with the conflict between the interests

¹³⁸⁷ *Ibid*, para 32.

¹³⁸⁸ *Ibid*.

¹³⁸⁹ It is interesting to note that the comparability test – the first phase of the proportionality analysis – was skipped. According to Haverkort-Speekenbrink, this is often due to the presence of suspect grounds of discrimination. See S. Haverkort-Speekenbrink, *European Non-Discrimination Law: A comparison of EU law and the ECHR in the field of non-discrimination and freedom of religion in public employment with an emphasis on the Islamic headscarf issue* (Intersentia, 2012), 150.

¹³⁹⁰ *Fretté*, para 38.

¹³⁹¹ *Ibid*, para 41.

¹³⁹² *Ibid*.

of the applicant and those of the children who are eligible for adoption.¹³⁹³ Adoption meaning “providing a child with a family” and not vice versa, it was argued that States should guarantee that the chosen adopter can offer the child the most suitable family environment. In that regard, the Court observed that the lack of a shared consensus crossed legal boundaries and characterised the whole scientific community.¹³⁹⁴ In particular, the Court held that:

It must be observed that the scientific community – particularly experts on childhood, psychiatrists and psychologists – is divided over the possible consequences of a child being adopted by one or more homosexual parents, especially bearing in mind the limited number of scientific studies conducted on the subject to date.¹³⁹⁵

As a result, national authorities – which grounded their decisions on the Government Commissioner’s submissions – were entitled to reject the applicant’s request for authorisation to adopt to safeguard the interests of the potential adoptees.¹³⁹⁶ To conclude, given the wide margin of appreciation enjoyed by States on the matter under scrutiny and the need to protect children’s best interests, the justifications provided by the Government were considered objective and reasonable and, therefore, no violation was found.

As a preliminary remark, Hodson’s statement as to the limited relevance of the judgment in *Salgueiro* for gay prospective fathers proved prophetic.¹³⁹⁷ Although the Court might seem to have taken a step back in the *Fretté* case, differing outcomes might simply derive from the different factual circumstances and, especially, those taken into consideration by the Court. As underlined by Judges Bratza, Fuhrmann and Tulkens in their partly dissenting opinion, in the case of *Salgueiro*, “there was already an established family life between the applicant and his daughter”.¹³⁹⁸ In the present case, no prior tie of filiation existed and the Court did not want to find itself out of step with national practices.¹³⁹⁹

This brings us to discuss the non-applicability of Article 8, compared to the Court’s case-law in the domains of ART and unmarried fatherhood. The claim of Mr Fretté is similar to those

¹³⁹³ *Ibid*, para 42.

¹³⁹⁴ *Ibid*, para 42.

¹³⁹⁵ *Ibid*.

¹³⁹⁶ *Ibid*.

¹³⁹⁷ Hodson, ‘Ties that Bind’, 511.

¹³⁹⁸ *Fretté*, Joint Partly Dissenting Opinion of Judge Sir Nicolas Bratza and Judges Fuhrmann and Tulkens.

¹³⁹⁹ Perreau, ‘The Politics of Adoption’, 68.

brought by Ms Evans, Mr Dickson and Mrs Dickson, as all the four applicants wished to become parents, either via ART or via adoption. It seems important to recall that, however, in the *Evans* and *Dickson* cases, Article 8 was held applicable. More specifically, in *Evans*, it was found that the matter at stake fell within the notion of private life, which, *inter alia*, encompasses the right to respect for both the decisions to become and not to become a parent.¹⁴⁰⁰ In the case of *Dickson*, the Court found that the refusal of artificial insemination facilities affected the applicants' private and family lives, which notions include the right to become genetic parents.¹⁴⁰¹ In light of the interpretation of Article 8 advanced in *Evans* and *Dickson*, it is not clear what distinguished the situation of Mr Fretté – apart from his sexual orientation – from those of the other applicants and determined the inapplicability of Article 8. At the same time, however, given that the case of *Fretté* was decided prior to the other two, the Court might have simply felt ready to widen the scope of Article 8 only at a later stage.

Similar doubts of inconsistency are casted by a comparison between the irrelevance of 'mere' desires, as stated in *Fretté*, and the definition of 'intended' family life adopted in the domain of unmarried fatherhood.¹⁴⁰² However, these doubts can be easily dismissed in light of the fact that, in the cases where this notion of family life was used, the Court explicitly circumscribed its relevance to the "potential relationship which could develop between a child born out of wedlock and his natural father".¹⁴⁰³ Moreover, what is valued for the purposes of intended family life are the nature and length of the mother-father relationship and the father's demonstrated interest and commitment to his already existing child, both before and after birth.¹⁴⁰⁴ Hence, although 'intended', this widened definition of family life seems to depend on the existence of a child, if not on the existence of a child biologically related to the applicant and born in a stable relationship between the applicant and the child's mother.¹⁴⁰⁵ Hence, this notion of family life is not applicable to aspiring adopting parents, even if the situation of Mr Fretté can be, to a certain extent, considered similar to the situation of an unmarried father who has never lived or met his child.

¹⁴⁰⁰ *Evans v UK*, Application no. 6339/05, 10 April 2007 (Grand Chamber), para 71.

¹⁴⁰¹ *Dickson v UK*, Application no. 44362/04, 4 December 2007, para 66.

¹⁴⁰² *Schneider v Germany*, Application no. 17080/07, 15 September 2011, para 82; *K.A.B. v Spain*, Application no. 59819/08, 10 April 2012, para 89.

¹⁴⁰³ *Lebbink v the Netherlands*, Application no. 45582/99, 1 June 2004, para 36.

¹⁴⁰⁴ *Ibid*; *Schneider v Germany*, para 82; *K.A.B. v Spain*, para 89. In the cases of *Schneider* and *K.A.B.*, moreover, the Court introduced another condition that the failed development of the father-child relationship had not to be attributable to the applicant.

¹⁴⁰⁵ This was in fact confirmed by the subsequent judgment in the case of *E.B. v France* – which will be analysed in the next sub-section.

Another important distinguishing factor of the current judgment, compared to the previous decision in *Salgueiro*, concerns the application of the margin of appreciation. While it was not at all mentioned in the previous case, the doctrine constitutes the core of the reasoning in *Fretté*. This different approach appears to further substantiate the perception as to the specific facts identified by the Court as relevant in the case of *Salgueiro*: Mr Salgueiro's complaint was framed as the refusal of parental responsibility to a biological and divorced father, rather than to a homosexual man living with another man. Moreover, the existence of a European consensus, also reflected by a well-established Strasbourg jurisprudence, as to the importance to ensure continuation of family life between a father and his child despite divorce might explain why the doctrine of the margin of appreciation was not held applicable in the previous case, although invoked by the Government.

The use of the doctrine in this case is problematic in at least one and possibly two respects. Firstly, in the present judgment, the reliance on the doctrine constitutes a clear example of judicial deference. Indeed, the award of a wide margin of appreciation to the State served to impose restrictions on the power of judicial review of the Court. As such, rather than undertaking a proportionality analysis, as required by Article 14, the Court eventually abstained from substantively scrutinising the refusal of the national courts to authorise Mr Fretté to adopt. Therefore, although the non-articulation of the Court's reasoning inevitably serves to obscure the true basis on which the Court decides whether a difference in treatment is justifiable and, accordingly, what features are required for a prospective father to obtain the authorisation to adopt, the doctrine did not operate as a mere "conclusory label"¹⁴⁰⁶, but rather as a means of adjudication.

Secondly, although it avails itself of one of the magnifying effects of Article 14 by considering the case through the lens of discrimination even if Article 8 was held inapplicable, the Court eventually disregards the suspect nature of the discrimination (as established in *Salgueiro*) and awards a wide margin of appreciation to the State on the ground of a lack of common ground among the laws of the Contracting States. However, the establishment of consensus, apart from not relying on comparative data,¹⁴⁰⁷ seems to be carried out in relation to the wrong issue, namely

¹⁴⁰⁶ Singh uses this expression to define cases where the margin of appreciation only serves to state a final conclusion as to whether a particular interference with one's right amounts to a violation or not. See R. Singh, 'Is there a role for the "Margin of Appreciation" in national law after the Human Rights Act?' 1999 1 *European Human Rights Law Review* 15-22.

¹⁴⁰⁷ In particular, the Court observed that: "It is indisputable that there is common ground on the question. Although most of the Contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt, it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues on which opinions within a democratic society may reasonably differ widely. The Court considers it quite

with respect to the general question whether homosexuals should be allowed to adopt. Bearing in mind the variety of magnifying effects of Article 14 – as identified by Arnardóttir – one could have expected the Court to state that, whenever States decide to provide for an additional right beyond the requirements of the Convention (in this case, the right to adopt), they are required to do so in a non-discriminatory manner. Such approach would have certainly led to the finding of a violation, as single individuals were allowed to adopt under French law and the request of Mr Fretté had been rejected on the sole basis of his sexual orientation. However, it might have been simply too early for such use of Article 14 to be proposed, as subsequent jurisprudence shows.

Moving onto the second line of reasoning adopted by the Court, namely the need to protect the child's best interests, two main observations can be advanced. Firstly, as argued by O'Flaherty and Fisher, by conceptualising the interests of the applicant and those of adoptable children as competing, the Court posed a false dilemma.¹⁴⁰⁸ Indeed, the actual tension exists between the rights of homosexual and heterosexual prospective adoptive parents, bearing in mind the paramount importance of the best interests of the child.¹⁴⁰⁹ Hence, the children's best interests should not simply represent one of the elements to take into account to achieve the desired balance, as held by the Court. Rather, as enshrined by Article 21 of the UN Convention on the Rights of the Child, States are required to ensure that the child's best interests are the paramount consideration in decisions concerning the placement of children for adoption.

In practice, however, it is argued that “the tendency has been to appropriate this principle as a tool to serve the political and the moral agendas of adults”.¹⁴¹⁰ Arguably, a misappropriation of this principle can be detected also in the present case. Indeed, its application has translated into a subjective assessment – namely, in accordance with “the value system of the decision-maker”.¹⁴¹¹

natural that the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters.” (para 41). The Court fails to back up its own references to “most of the Contracting States” and, therefore, its conclusions, as to the lack of a common approach with accurate comparative research, indicate an alleged disparity of legal approaches. Moreover, the reference to “social orders” casts doubts as to the domain within which the existence of consensus is sought and assessed – i.e., whether legal responses or social responses matter. According relevance to societal attitudes in order to establish the existence of a common ground entails the risk of letting social prejudice and stereotypical notions define the human rights of individuals.

¹⁴⁰⁸ *Fretté*, para 42.

¹⁴⁰⁹ M. O'Flaherty and J. Fisher, ‘Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles’ 2008 8(2) *Human Rights Law Review* 219.

¹⁴¹⁰ *Ibid.*

¹⁴¹¹ Justice Brennan, quoted by Tobin and McNair, ‘Public International Law and the Regulation of Private Spaces’, 114.

The French authorities and, more problematically, the Court seem to endorse or, at least, to accept the presumption that a certain category of individuals, namely single homosexual men, should be disfavoured *a priori* because they do not serve the best interests of the child. The stereotype at issue is, therefore, of a compounded nature. The traits of Mr Fretté as a single homosexual man were compounded in a way that denied him permission to adopt. On the other hand, an objective application of the principle of the best interests – like that proposed by the partly dissenting Judges Bratza, Fuhrmann and Tulkens – would have justified the refusal of authorisation on the basis of his sexual orientation only “if it had been combined with conduct that was detrimental to a child’s upbringing”.¹⁴¹²

Under the belief that children need parents, eligibility for adoption within national statutes has become increasingly focused on parental behaviour, rather than on characteristics of the prospective parent.¹⁴¹³ This shift, however, does not appear to have taken place either in France or within the Court’s jurisprudence, at least, at the material time. Indeed, despite the national courts’ emphasis on several occasions, any decisiveness of Mr Fretté’s “personal qualities and aptitude for bringing up children”¹⁴¹⁴ was dismissed to the advantage of his sexual orientation and associated lifestyle. As pointed out by the partly dissenting judges, if Fretté had been a heterosexual or if he had concealed his homosexuality, he would have certainly been granted authorisation because his personal qualities were acknowledged throughout the proceedings.¹⁴¹⁵

Evidently, Mr Fretté’s qualities and conduct were not at the core of the analysis. Rather, what was questioned and eventually rejected was the general idea of a homosexual man raising a child, to whom he has no biological or legal connection.¹⁴¹⁶ As a result, the Court did not only fail to adopt an anti-stereotyping perspective; rather, it contributed to perpetuating gender stereotypes. In so doing, it confirmed the indispensability of heterosexuality to make someone a father worthy of legal recognition. This appears even truer, if regard is given to the jurisprudence that followed.

¹⁴¹² *Fretté*, Joint Partly Dissenting Opinion.

¹⁴¹³ M. Wald, ‘State Determinations Regarding Placement of Children’, 384; J. Masson, ‘Parenting by Being; Parenting by Doing – In Search of Principles for Founding Families’ in A. Pedain and J. Spenser (eds.), *Freedom and Responsibility in Reproductive Choices* (Hart, 2006), 138-141.

¹⁴¹⁴ Decision of the Conseil d’Etat, excerpt reported in the judgment of *Fretté*, para 16.

¹⁴¹⁵ *Fretté*, Joint Partly Dissenting Opinion.

¹⁴¹⁶ L. Hart, ‘Individual Adoption by Non-Heterosexuals and the Order of Family Life in the European Court of Human Rights’ 2009 36(4) *Journal of Law and Society* 549.

2.3 *E.B. v France*:¹⁴¹⁷ Gender Stereotyping and a Reinterpreted Ambit of Article 14

E.B. was in a stable relationship with a woman, Ms R., who did not feel committed by the former's application to adopt. The national authorities' refusal to authorise E.B. to adopt was grounded on the lack of a paternal referent and the ambivalence of the commitment of each member of the household.¹⁴¹⁸ Also in the case of *E.B.*, the Court came to the inescapable conclusion that "her sexual orientation was consistently at the centre of deliberations in her regard and omnipresent at every stage of the administrative and judicial proceedings", ¹⁴¹⁹ and, therefore, that E.B. had suffered a difference in treatment. However, different from the outcome in *Fretté*, the justifications put forward by the Government were deemed unconvincing and a violation of Article 14 taken in conjunction with Article 8 was found.

As to the applicability of Article 14, taken in conjunction with Article 8, the Court reiterated that Article 8 does not include either the right to adopt or the right to found a family. In order to explain why the issue at stake did not fall within the notion of family life, the Court restated that the right to respect for family life requires the existence of a family and – in line with the interpretation provided in relation to the judgment in *Fretté* – confirmed the relevance of the mother-father relationship and/or of the biological link between the father and the child to determine whether a parent-child relationship might exceptionally fall within the notion of 'intended family life'. Indeed, it was held that the right to respect for family life presupposes – at the very least – "the potential relationship between, for instance, a child born out of wedlock and his or her natural father, or the relationship that arises from a genuine marriage, even of the family life has not yet fully established".¹⁴²⁰ Although the relationship in question could not qualify as 'family life', the Court concluded that it would still fall within the broad concept of 'private life', which incorporates, *inter alia*, the right to establish and develop ties with other human beings and the right to respect decisions to become or not become a parent.¹⁴²¹

Although national administrative authorities did not expressly rely on E.B.'s 'choice of lifestyle' to justify their refusal, the Court acknowledged that the first ground of dismissal relied on by the Government was clearly a pretext for rejecting the application on the basis of her sexual

¹⁴¹⁷ *E.B. v France*, Application no. 43546/02, 22 January 2008.

¹⁴¹⁸ *Ibid*, paras 38-39.

¹⁴¹⁹ *Ibid*, para 88.

¹⁴²⁰ *Ibid*, para 41.

¹⁴²¹ *Ibid*, para 43.

orientation.¹⁴²² As emphasised by the Court, the lack of a paternal or maternal figure in the household represented a direct consequence of single-parent adoption, which is expressly allowed by French law. Consequently, to require a prospective single-parent to establish the presence of a referent of the other sex amounted to render void the right of single persons to apply for authorisation.¹⁴²³ In the Court's opinion, the reliance on that specific ground might have therefore led to an arbitrary refusal.

In relation to the second ground of dismissal, the Court considered that the lack of commitment of Ms E.B.'s cohabitating partner had nothing to do with the applicant's sexual orientation, but simply reflected the *de facto* situation and its implications for the adoption of a child.¹⁴²⁴ Therefore, it concluded that the applicant had not been discriminated against on the basis of her sexual orientation in this regard. However, the Court was of the opinion that the two grounds ought to be treated concurrently, rather than separately, since they belonged to the overall assessment of the applicant's situation.¹⁴²⁵ As a result, the illegitimacy of the first ground was found to affect the entire decision.¹⁴²⁶

Having established a difference in treatment, the Court skipped the comparability test and embarked directly on a proportionality analysis. To prepare the terrain, it argued that, whenever sexual orientation is in question, there is a need for particularly convincing and weighty reasons to justify a difference in treatment that affect Article 8 rights.¹⁴²⁷ It further stated that the Convention is a living instrument and, therefore, it has to be interpreted in light of present-day conditions.¹⁴²⁸ In light of the above and given that French law allows for single-parent adoption, the Court concluded that the reasons advanced by the Government could not be considered as sufficiently convincing and weighty to justify the refusal to grant authorisation to adopt to Ms E.B.¹⁴²⁹ Before finding a violation of Article 14 taken in conjunction with Article 8, the Court

¹⁴²² *Ibid*, para 73. Indeed, although not directly relied on, the applicant's 'choice of lifestyle' was mentioned several times. For instance, at para 10, the report of the socio-educational assistant stated: "[R]egard being had to her current lifestyle: married and cohabitating with a female partner, we have not been able to assess her ability to provide a child with a family image revolving around a parental couple such as to afford safeguards for that child's stable and well-adjusted development".

¹⁴²³ *Ibid*, para 73.

¹⁴²⁴ *Ibid*, para 78.

¹⁴²⁵ *Ibid*, para 80.

¹⁴²⁶ *Ibid*.

¹⁴²⁷ *Ibid*, para 91.

¹⁴²⁸ *Ibid*, para 92.

¹⁴²⁹ *Ibid*, para 93.

stressed that, as emerging from the judgment of the Conseil d'Etat, the applicant possessed “undoubted qualities and an aptitude for bringing up children”, which were certainly compatible with the child’s best interests.¹⁴³⁰

Despite the ‘good’ outcome, it might appear problematic to consider the judgment in *E.B. v France* as a milestone in the process of ensuring equal family rights to homosexuals due to a poorly justified departure from precedent. No explanation is offered to justify the shift from a wide margin of appreciation to the weighty reasons test. Given the precedent in *Fretté*, one would expect the Court to explain why the rule of consensus was no longer relevant or whether consensus had emerged.¹⁴³¹ The application of the doctrine of the margin of appreciation was never considered; rather, at least according to Johnson, given the absence of any reference to present-day conditions that triggered a dynamic interpretation, the living instrument doctrine was used to endorse judicial activism and, more precisely, to “concretely interpret the Convention to challenge a heteronormative consensus”.¹⁴³²

Apart from failing to explain the alleged changed conditions, *vis-à-vis* the same evidence, the Court decided to attach weight to the applicant’s parental abilities and their compatibility with the child’s best interests in the case of *E.B.*, but not in the case of *Fretté*. Indeed, it must be recalled that the Conseil d’Etat had explicitly recognised the applicant’s “undoubted qualities and aptitude for bringing up children”, although eventually concluding that he did not provide the necessary safeguards for adopting a child.¹⁴³³ Hence, while the qualities and aptitude for raising a child were considered sufficient to authorise a lesbian woman to adopt, they proved insufficient to trigger the same positive outcome for a gay man. One possible interpretation of such difference seems to confirm the Court’s strong attachment to a conventional ideology of fatherhood. The Court seems of the opinion that nurturing abilities and intentions do not suffice to make someone a father; instead, in order to be valued, they need to be complemented with traditional features, such as biology, marriage and heterosexuality.

Moreover, it seems that, in the case of *E.B.*, the Court decided to pick and chose the factual circumstances relevant to the determination of the child’s best interests. As pointed out by the dissenting Judge Costa joined by Judges Turmen, Ugrekhelidze and Jociene, the fact that E.B.’s

¹⁴³⁰ *Ibid*, para 95.

¹⁴³¹ I. Curry-Sumner, ‘E.B. v France: a missed opportunity?’ 2009 21(3) *Child and Family Law Quarterly* 363.

¹⁴³² Johnson, ‘Homosexuality and the ECtHR’, 86.

¹⁴³³ *Fretté*, para 16.

cohabiting partner did not support the adoption plan was unlikely to meet the guarantees required by the French law to ensure the child's best interests.¹⁴³⁴ As argued by Bainham, "there is a strong case for saying that someone whose long-term partner is unwilling to join in should not be allowed to proceed"¹⁴³⁵ – *in primis*, the potential for conflict between the applicant and her partner and the child's potential exposure to such conflict.¹⁴³⁶

It must be noted that the Grand Chamber attempted to prepare the ground for a departure from precedent by identifying three differences between the case of *Fretté* and that of *E.B.* Firstly, it noted that the national administrative authorities had not openly referred to E.B.'s 'choice of lifestyle'; secondly, they had even acknowledged the applicant's child-raising and emotional capacities; finally, although E.B. had applied for adoption as an individual, the presence of her partner was an element that had not featured in the previous case.¹⁴³⁷ However, none of these factors appear distinguishable or decisive enough to justify a jurisprudential shift. Concerning the first one, the Court itself recognised, despite not making an explicit reference to it, that E.B.'s sexual orientation had informed all stages of the domestic proceedings and determined the ultimate refusal. In relation to the second element, positive considerations regarding the applicant's personal qualities and aptitude for raising a child were also included in the case-file of Mr Fretté and, more importantly, their acknowledgement did not prevent a refusal in either case.¹⁴³⁸ Therefore, the potential presence of a co-parent – who did not wish to become involved – represents the sole real 'distinguishing' feature. However, the Court deemed the above circumstance irrelevant for the purpose of establishing discrimination on grounds of sexual orientation and, accordingly, for the resolution of the case.

Given the absence of distinguishing factual elements and the failed reference to the rule of consensus, it remains to be ascertained what instigated the jurisprudential turn in the case of *E.B.* Two possible, and not mutually exclusive, explanations can be advanced. Firstly, one could argue that sex role stereotypes might have played a role in determining the outcome in *E.B. v France*. More specifically, the application brought by Ms E.B. might have attained greater success by virtue

¹⁴³⁴ *E.B.*, Dissenting Opinion of Judge Costa joined by Judges Turmen, Ugrekhelidze and Jociene, para 6.

¹⁴³⁵ A. Bainham, 'Homosexual Adoption' 2008 67(3) *Cambridge Law Journal* 480.

¹⁴³⁶ The dissenting Judge Mularoni was of a similar opinion: "where a single person seeking to adopt is in a stable relationship with another person (...), the administrative authorities has the right and the duty to ensure – even if the relationship in question is not a legally binding one – that the conduct or personality of the third person, considered on the basis of objective considerations, is conducive to providing a suitable home".

¹⁴³⁷ *E.B.*, para 71.

¹⁴³⁸ *Fretté*, para 10.

of the gender of the applicant and the associated stereotypical notion that women have stronger nurturing and parenting abilities than men. If this turns out to be true, the Court's jurisprudence on adoption by single homosexuals might be accused of being tainted by sympathy towards lesbians and, more specifically, of replicating a traditional division of labour along gendered lines within the context of homosexual relationships, with the inevitable consequence of excluding gay men from the realm of childcare.

At the same time, however, the Court's departure from precedent might also be read as signalling the Court's starting to employ Article 14 as a magnifying lens, within the domain of homo-parenthood, to cover not only the rights enshrined in the Convention, but also those additional rights provided by States.¹⁴³⁹ Different from the case in *Fretté v France*, the present judgment does not seem concerned with the general question whether homosexuals should be given access to adoption, but rather with the more specific issue of discrimination on grounds of sexual orientation. This might explain why the Court did not consider the existence or non-existence of consensus and stated the need for weighty reasons to justify the contested difference in treatment. Although within the first stage of analysis (applicability of Article 14, taken in conjunction with Article 8), the Court explicitly stated that "the State which goes beyond its obligations under Article 8 in creating such a right (...) cannot, in the application of that right, take discriminatory measures".¹⁴⁴⁰ Hence, overruling the decision in *Fretté* seems to be, simultaneously, informed by stereotypical notions around parenting and the outcome of the use of Article 14 as a magnifying lens.

2.4 Second-Parent Adoption Cases: the Special Status of Marriage and the (Limited) Magnifying Effect of Article 14

The institution of second-parent adoption aims to establish a legal connection between the biological child of one partner/first parent and the other partner/second parent without the first parent being deprived of any parental rights. As such, different from single-parent adoption, it serves to place a legal stamp on already existing social ties. The Court has thus far expressed its views on the exclusion of same-sex couples from the institution of second-parent adoption in two

¹⁴³⁹ Arnardóttir, 'Discrimination as a Magnifying Lens', 337.

¹⁴⁴⁰ *E.B.*, para 49.

cases: *Gas and Dubois v France*,¹⁴⁴¹ and *X and Others v Austria*.¹⁴⁴² Although lesbian couples brought these complaints, the judgments are relevant to the current analysis, as indicative of the Court's persisting attachment to marriage as a preferred *locus* for parenthood. The current position of the Court can be summarised as follows: States can legitimately maintain access to second-parent adoption as a privilege for married couples; but, in case they provide this possibility to unmarried couples, they cannot do so in a discriminatory manner to the disadvantage of unmarried same-sex couples.

In the case of *Gas and Dubois*, the applicants were two lesbian women, which had cohabitated since 1989. In 2000, Ms Dubois gave birth to a daughter (A.) conceived by means of anonymous sperm donation. The child lived with them since birth. After entering into a civil partnership agreement, the non-biological mother applied for a simple adoption order in respect of her partner's daughter. The Court of Appeal, in line with the lower court's views, held that, despite Ms Gas' demonstrated active involvement in ensuring the child's emotional and material wellbeing, the legal implications of the sought adoption order would not be in the child's best interests. Indeed, such adoption would have resulted in transferring parental responsibility to the adoptive parent, thus depriving Ms Dubois of her own rights in relation to the child.¹⁴⁴³

Since a transferral of parental responsibility did not occur where the adoptive parent was married to the adoptee's biological parent, the applicants claimed that they had been subject to discrimination on the basis of their sexual orientation due to the legal prohibition of same-sex marriage in France, at the material time. The discriminatory difference in treatment was complained with respect to both married couples and heterosexual couples, who cohabitated or had entered a civil partnership, since the latter could bypass the contested legal requirement by marrying.¹⁴⁴⁴ To substantiate their claims, the couple drew a comparison between the situation of A. and that of another child, who was conceived via anonymous sperm donation by a woman living

¹⁴⁴¹ *Gas and Dubois v France*, Application no. 25951/07, 15 March 2012. It must be noted that, *inter alia*, the applicants had entered a civil partnership agreement; the child was born through artificial insemination and had lived all her life in the applicants' shared home.

¹⁴⁴² *X and Others v Austria*, Application no. 19010/07, 19 February 2013 (Grand Chamber). In this case, the applicants were two women in a stable homosexual relationship and the son of one of them. It should be noted that the Court found a violation of Article 14 taken in conjunction with Article 8 on account of the difference in treatment of the applicants *vis-à-vis* unmarried heterosexual couples in which one partner wished to adopt the other partner's child. Under Austrian law – different from French law – the latter were allowed a second-parent adoption.

¹⁴⁴³ *Gas and Dubois*, para 13.

¹⁴⁴⁴ *Ibid*, para 42.

together with a man.¹⁴⁴⁵ In the second scenario, the man cohabitating with the mother would have automatically become the child's legal father, without the need to apply for simple adoption.¹⁴⁴⁶

As to the applicability of Article 14 taken in conjunction with Article 8, the Court did no more than state that the examination of the applicants' specific situation entailed the conclusion that 'family life' existed between them. This issue was considered in more depth in the admissibility decision, where the Court concluded that the ties between the couple and A. amounted to family life on the ground that the couple had cohabitated since 1989, they had entered a civil registered partnership and they were jointly involved in the child's upbringing.¹⁴⁴⁷ Thus, in line with the jurisprudence on unmarried parents, the Court seems to derive the existence of *de facto* family ties from the length and nature of the relationship between the applicants and their joint provision of care to A.

When considering the applicants' legal situation compared with that of married couples, it reiterated a lack of obligations on Contracting States to grant same-sex couples access to marriage, as established in the judgment of *Schalk and Kopf v Austria*. More importantly, it added that Ms Gas and Ms Dubois and a married couple were not similarly situated because marriage conferred a "special status", which, in turn, entailed 'special' social, personal and legal consequences.¹⁴⁴⁸ Hence, for the purposes of second-parent adoption, the Court held that the situation of the applicants was not comparable to that of a married couple. In summary, the Court accepted the Government's submission according to which, because marriage remained the institution that ensured the highest degree of stability, restrictions on simple adoption pursued a legitimate aim, namely the provision of a stable framework for children's care and upbringing.¹⁴⁴⁹ In other words, the Court accepts that stereotypical notions about marriage as a legitimate justification for discrimination.

In relation to the second part of the applicants' claim, the Court merely observed that a simple adoption order would have been also refused to an unmarried heterosexual couple and,

¹⁴⁴⁵ *Ibid*, para 43.

¹⁴⁴⁶ *Ibid*.

¹⁴⁴⁷ *Gas and Dubois*, Admissibility decision, under section 2 'Objection of incompatibility ratione materiae'.

¹⁴⁴⁸ *Gas and Dubois*, para 68. However, the Court failed to consider whether there was an objective and reasonable justification for the difference in treatment between unmarried same-sex and married different-sex couples. The Court was able to skip this stage of review by holding the incomparability of their legal situations at para 68. See P. Johnson, 'Adoption, Homosexuality and the European Convention on Human Rights: *Gas and Dubois v France*' 75(6) 2012 *Modern Law Review* 1142-1143.

¹⁴⁴⁹ *Gas and Dubois*, para 49.

therefore, no difference in treatment could be found. More alarmingly, Ms Gas and Ms Dubois' complaint of indirect discrimination was dismissed outright, by simply referring to its previous findings concerning marriage (paragraphs 66-68).¹⁴⁵⁰ Accordingly, no violation of Article 14, taken in conjunction with Article 8, was established.

This judgment appears to backtrack and reinstate the protection of the marital family, in light of its allegedly unique positive implications for children, as a justification for excluding same-sex couples from second-parent adoption. As a consequence, it suggests that, it is acceptable for national legislations to subject the recognition of someone/social parent as a child's legal parent on the existence of a marital connection with the child's biological parent and the aspiring second parent. Similar to the judgment in *Fretté*, although with respect to a lesbian couple in a civil partnership, the Court restates the insufficiency of nurture (and not only nurturing intentions) to make someone a legal parent. In other words, the provision of care since the child's birth is deemed to deserve weight only if it occurs within a married family. Hence, the Court reinforces the marital conception of parenthood.

Paradoxically, reserving the legal possibility of adopting one's partner's child to married families is portrayed as a child-friendly measure. The reasoning underlying this approach can be summarised as follows: unmarried couples' access to children – through adoption, artificial reproductive technologies, award of parental responsibility, etc. – ought to be restrained as much as possible because, different from marriage, civil partnerships accord “greater leeway with regard to entering into them and terminating them”.¹⁴⁵¹ Otherwise stated, *de facto* relationships are deemed more prone to crisis and sudden breakdown and children are the most vulnerable victims in such events. At the other end of spectrum, however, high divorce rates seriously challenge the foundation of the suggested narrative.

Actually, what seems to run contrary to the child's best interests is the exclusion - rather than the claimed inclusion - of same-sex partners from second-parent adoption and, more generally, the maintenance of differences between civil partnership and marriage laws (perfectly acceptable, according to the judgment in *Schalk and Kopf v Austria*).¹⁴⁵² As pointed out by a study

¹⁴⁵⁰ *Ibid*, para 71.

¹⁴⁵¹ *Ibid*, para 49 (Government's submission).

¹⁴⁵² This was expressly recognised by the South African Constitutional Court in the case of *Tu Toit and Another v Minister of Welfare and Population Development and Others*, 10 September 2002, para 22. The text of the decision is available at <http://www.saflii.org/za/cases/ZACC/2002/20.html> last access on 25th April 2013.

of the Council of Europe Commissioner for Human Rights, the consequences of non-recognition of parent-child emotional and social ties are of daily importance.¹⁴⁵³ Social parents are prevented from making decisions concerning fundamental aspects of their child's life, for instance in questions about their education and health care. Moreover, they are ineligible for State benefits and fiscal privileges, which are specifically designed to support families. Further uncertainties arise in the case of parental separation: the child does not benefit from the safeguards ensured by divorce laws and, consequently, the position of each parent in relation to custody, contact and alimony remains totally undefined. Similarly, should the child's biological mother die, the co-parent would not automatically be entrusted with the child's custody; on the contrary, the child would become an orphan and, most probably, be placed in the care of a guardian or a foster family.

In the present case, however, even if the child had a legal tie with her biological mother only, this was not deemed by the majority to prevent the applicants from conducting a normal family life.¹⁴⁵⁴ Having regard to the positive obligations stated in the case of *Marckx*, it is difficult to explain why France was not considered to have a positive duty to legally recognise an existing family tie, in the case of *Gas and Dubois*. In line with the observation made with respect to the judgments in *X, Y and Z v UK*, the non-application of the positive obligation to the present case seems to constitute a further example of the Court's tendency to water down positive obligations when the family life at stake has unconventional features.¹⁴⁵⁵ More precisely, the sexual orientation of the couple might have been interpreted as justifying a departure from its previous jurisprudence and, therefore, a differential treatment with respect to the positive obligation to grant legal recognition to *de facto* family ties. As a result, just like *X, Y and Z*, the applicants' relationships are recognised as 'family life' under Article 8, but, paradoxically, are denied legal recognition and protection.

Another possible explanation for the controversial final outcome of the case is pointed out by Judge Villiger in his dissenting opinion: "the judgment focuses on the adults, but not on the children who are nevertheless an integral part of the applicants' complaint".¹⁴⁵⁶ Indeed, as argued

¹⁴⁵³ Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe* (Council of Europe Publishing, June 2011), 96 available at http://www.coe.int/t/Commissioner/Source/1.CommHR_LGBTreport_pages1-10.pdf last access on 23rd April 2013.

¹⁴⁵⁴ This is explicitly stated by Judges Spielmann and Berro-Lefèvre in their concurring opinion.

¹⁴⁵⁵ U. Kilkelly, 'Protecting children's rights under the ECHR: the role of positive obligations' 2010 61(3) *Northern Ireland Legal Quarterly* 254.

¹⁴⁵⁶ *Gas and Dubois*, Dissenting Opinion of Judge Villiger, page 24 of the decision.

by the dissenting judge as well as by Judges Spielmann and Berro-Lefèvre in their concurring opinion, it is undisputed that depriving a child from the possibility of joint parental custody and, thus, leaving him/her in a precarious legal status runs counter the child's interests.¹⁴⁵⁷ Judge Villiger went even further to argue that, as a result of the contested legislation, children of same-sex couples suffered different treatment, contrary to Article 14 taken in conjunction with Article 8, if compared to children of heterosexual couples. Indeed, while the latter could benefit from joint parental responsibility, if the parents marry, children of same-sex couples are *a priori* excluded from this possibility.

As argued by the dissenting judge, the crucial problem was the blanket prohibition of joint parental custody over children of the parent of a same-sex couple. As recalled by Judge Villinger, this was not the first instance where the Court was called to decide upon the compatibility of a blanket provision with the Convention. In the cases of *Zaunegger* and *Schneider*, the Court was confronted by blanket legislation, which prohibited contact or joint custody against the mother's will to all unmarried fathers.¹⁴⁵⁸ However, different from the present case, in those judgments, the Court held that the legislation did not meet the proportionality test and concluded that, in the name of the child's best interests, national authorities should have decided on a case-by-case basis, having regard to the specific circumstances of each case. Differently, in the case of *Gas and Dubois*, the Court was of the opinion that the difference in treatment was justified by the special status that marriage holds in society. As such, it seems that the Court feels ready to contest stereotypical notions around unmarried families, but only within the context of heterosexuality.

The fact that the Court blindly accepted that reserving a special status to marriage (in the wake of the decision in *Schalk and Kopf v Austria*) did not amount to discrimination on grounds of sexual orientation confirms its adherence to a heteronormative paradigm.¹⁴⁵⁹ The same stance was adopted in the latest judgment delivered by the Court in homo-parenthood, namely in the case of *X and Others v Austria*. The factual circumstances are similar to those in *Gas and Dubois*, with two differences: under Austrian law, second-parent adoption was allowed not only to married, but also to unmarried heterosexual couples; the applicants were two lesbians in a stable, but not formalised, relationship and the biological son of one of them. The latter was born out of wedlock

¹⁴⁵⁷ *Ibid*, Concurring Opinion of Judge Spielmann and Judge Berro-Lefèvre.

¹⁴⁵⁸ *Schneider v Germany*; *Zaunegger v Germany*.

¹⁴⁵⁹ P. Johnson, 'Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority' 2011(20) *Social and Legal Studies* 349.

from a heterosexual relationship and had lived with his mother and her partner since he was five years old.¹⁴⁶⁰

When considering whether the difference in treatment of the applicants (a same-sex couple) *vis-à-vis* unmarried heterosexual couples in which one partner wished to adopt the other partner's child was justified, the Court found a violation of Article 14 taken in conjunction with Article 8.¹⁴⁶¹ In particular, the Court began by noting that had the adult applicants been a man and a woman, national authorities would not have been able to refuse their request as a matter of principle, rather they would have been required to investigate whether the requested adoption was in the child's best interests.¹⁴⁶² In light of this, the Court concluded that there was a difference in treatment and the latter was inevitably based on the couple's sexual orientation.¹⁴⁶³

When assessing whether the differential treatment was justified, the Court found it important to stress that it was not called to rule on the general issue of same-sex couples' access to second-parent adoption, but rather on the narrower question of alleged discrimination between unmarried heterosexual couples and same-sex couples with respect to second-parent adoption.¹⁴⁶⁴ It went on to reiterate a series of general principles developed in its previous case-law. Firstly, it was observed that the Convention is a living instrument and, therefore, States are required to take into consideration recent developments in society – for instance, the multiple ways of leading one's family life – when designing measures to protect the family in its traditional sense.¹⁴⁶⁵ Moreover, it was noted that, when a suspect ground like sexual orientation is at stake, States enjoy a narrow margin of appreciation.¹⁴⁶⁶ Further, it argued that, different from individual adoption – where there has been no previous contact between the adopter and the child – in cases of second-parent adoption – like the present one – the adopter already enjoys family ties with the child; and, in line with its previous jurisprudence, the Court cannot but recall the importance of providing legal

¹⁴⁶⁰ Another distinguishing factor, although irrelevant for present purposes, is that the applicants were a lesbian couple in a stable relationship (not formalised) and the biological son of one of them.

¹⁴⁶¹ The controversial nature of the decision of the majority becomes evident from the arguments put forward by the seven dissenting judges, who felt the majority had exceeded the usual limits of the interpretation of the Convention as a living instrument, “anticipating social change rather than recognising it”. (B. Rainey, E. Wicks and C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (OUP, 2014), 348).

¹⁴⁶² *X and Others*, para 125.

¹⁴⁶³ *Ibid*, para 30.

¹⁴⁶⁴ *Ibid*, para 134. In slightly different terms, this was restated at paras 149 and 152.

¹⁴⁶⁵ *Ibid*, para 139.

¹⁴⁶⁶ *Ibid*, para 140.

recognition to a *de facto* family relationship.¹⁴⁶⁷

Therefore, the dissenting opinion of Judge Villinger in the case of *Gas and Dubois* seems to have become majoritarian in the case of *X and Others v Austria*. Indeed, the Court made express reference to its previous judgments, including *Zaunegger v Germany*, where the Court found a violation of Article 14 taken in conjunction with Article 8 because the father of a child born out of wedlock was denied an examination by national courts on whether the award of joint custody to both parents served the child's best interests.¹⁴⁶⁸ In other words, the Court states that the national court's refusal to grant second-parent adoption violated Article 14 taken in conjunction with Article 8 because the applicants' request had not been assessed individually, as second-parent adoption for same-sex couples is *a priori* excluded by law. The underlying reasoning seems to rest on a doctrinal evolution pertaining to Article 14, like in the case of *E.B.* Although there is no obligation under Article 8 to extend the right to second-parent adoption to unmarried couples, once this additional right is provided, the State cannot ensure its recognition and protection in a discriminatory manner. Moreover, in calling for an investigation of the compatibility of the sought second-parent adoption with the child's best interests in light of the specific circumstances of the case, the Court implicitly endorses an anti-stereotyping approach.

However, this positive outcome bears the burden of a continuing preference for marriage. In fact, when analysing the situation of the applicants *vis-à-vis* that of a married family in which one spouse wished to adopt the other's child, the Court found it appropriate to recall the considerations made in the case of *Gas and Dubois*, thus confirming marriage as the privileged source of parental status. Hence, also in the case of *X and Others v Austria*, the Court concluded that the first and third applicants were not in a relevantly similar situation to a married couple and, therefore, no violation could be found. Based on this judgment, the Court has not yet proved prepared to take advantage of the doctrinal development concerning Article 14, when same-sex couples are discriminated against if compared to married couples. This has two major implications. Firstly, the magnifying effect of Article 14 has not yet led to the adoption of an anti-stereotyping approach with respect to the institution of marriage. An individual assessment of the case is held unnecessary, when a comparison is with a heterosexual married couple; and, as a result, same-sex couples' widespread exclusion from marriage remains an obstacle to equal parental rights.

¹⁴⁶⁷ *Ibid*, para 145.

¹⁴⁶⁸ *Ibid*, para 152.

Secondly, with respect to marriage, the application of Article 14 has not yet proved able to override the lack of a European consensus, which – although not explicitly relied on – seems to remain the factor determining the final outcome of the case.

3. Concluding Remarks: Continuity and Article 14 as the Only Spark for Change

Bearing in mind the limited sample of cases at our disposal, it can be concluded that the Court has failed to challenge the conventional ideology of fatherhood in two-and-a-half respects. Firstly, based on the comparison between the judgment in *Fretté v France* and *E.B. v France*, it seems possible to detect the Court's potential endorsement of the man-breadwinner/woman-homemaker stereotype and the latter's role in providing different outcomes, despite common factual grounds. As noted above, the two judgments show a different weight attached to nurturing intentions and abilities, depending on whether the applicant is a man or a woman: while the applicant's personal qualities and aptitude for raising children is deemed relevant to justify the finding of a violation, when the aspiring adopter is a lesbian woman, the same evidence was completely disregarded with respect to a single homosexual man.

The poorly justified reversal of the judgment in *Fretté* by the case of *E.B.* might therefore be interpreted as revealing the Court's adherence to general assumptions which regard women as better equipped to take care of children and reduce men's role to economic provision. As such, the Court seems to implicitly state that, when prospective fathers are in question, their demonstrated aptitude for raising a child needs to be supplemented with other, conventional features. In fact, Mr Fretté's caregiving and emotional abilities were undisputed; nonetheless, he was found to have "difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child",¹⁴⁶⁹ possibly because of the sole fact that he was a single man. Against this, the presence of an uncommitted partner within the prospective family of an adopted child was not considered an obstacle to ensure the best interests of that child under the assumption that the necessary care would be provided by Ms E.B.

Secondly, the judgments in *Salgueiro*, *E.B.* and *X and Others* (concerning the applicants' comparison with unmarried heterosexual couples) can be read as contesting the relevance of heterosexuality as a determining factor in the allocation of custody rights or of the status of legal

¹⁴⁶⁹ Decision of the Paris Social Services Department, para 10 of the judgment in *Fretté v. France*.

parent on the applicant. Indeed, in all these cases, the Court found a violation because the Government failed to provide sufficiently weighty reasons to justify differential treatment on grounds of sexual orientation. In other words, the Court is of the opinion that homosexuality *per se* does not amount to sufficient justification for differential treatment. At the same time, however, heterosexuality is kept alive as a relevant feature through the Court's attachment to a heteronormative definition of marriage. Indeed, a more attentive analysis of the judgment in *Salgueiro* (especially in light of the subsequent judgment in *Fretté*) and the judgments in *Gas and Dubois* and *X and Others* (concerning the applicants' comparison with heterosexual married couples) reveal that the conferral of parental status as well as of parental rights on homosexuals remains very much dependent on the existence of a present or past marriage.

Marriage – and, possibly, also biology – appeared to be the keystone factor for finding a violation in the case of *Salgueiro*. The persistence of marriage as a privileged legal condition for (more, generally) homo-parenthood emerges more clearly from the cases concerning second-parent adoption. In both cases, the Court concluded that a lesbian couple, in which one partner wished to adopt the other partner's child without severing the mother's legal ties with the child, was not in a relevantly similar situation to a married couple who could avail of second-parent adoption. Indeed, it was held that “marriage confers a special status on those who enter into it” and “gives rise to social, personal and legal consequences”.¹⁴⁷⁰ Hence, no violation of Article 14 taken in conjunction with Article 8 was found.

The judgments in *Salgueiro*, *Gas and Dubois* and *X and Others* (concerning the applicants' comparison with heterosexual married couples), therefore, indicates that the apparent departure from heterosexuality as a relevant feature is only partial, as it depends on the employment of Article 14 as a magnifying lens and, more importantly, is *de facto* limited by the maintenance of special regimes for married couples. Within the context of homosexuality, the special status of marriage obstructs the application of Article 14 in its reinterpreted scope. In other words, Article 14 is not yet magnificent enough to overcome a heteronormative conception of marriage.

¹⁴⁷⁰ *Gas and Dubois*, para 68; *X and Others*, para 106. However, the Court failed to consider whether there was an objective and reasonable justification for the difference in treatment between unmarried same-sex and married different-sex couples. The Court was able to skip this stage of review by holding the incomparability of their legal situations at para 68. See P. Johnson, ‘Adoption, Homosexuality and the European Convention on Human Rights: *Gas and Dubois v France*’ 75(6) 2012 *Modern Law Review* 1142-1143.

This tolerance towards differential treatment grounded on marital status seems to reveal the invisible operation of the doctrine of the margin of appreciation and, more specifically, the Court's fear to find itself out of step with national practices, in particular with national legislation that maintains a heteronormative definition of marriage. In the judgment of *Gas and Dubois*, the impact of the doctrine on the final outcome was expressly recognised by Judges Costa and Spielmann in their concurring opinions. As a closing remark, they observed that national legislators are better placed than a supranational court to reconsider and bring about change in institutions relating to the concept of marriage, the family and parent-child relationships. Since the stance adopted in *Gas and Dubois* was repeated in the judgment of *X and Others* (concerning the applicants' comparison with heterosexual unmarried couples), it can be assumed that the same considerations applied. Having regard to the judgments in *Gas and Dubois* and *X and Others* (concerning the applicants' comparison with heterosexual married couples), therefore, it seems possible to draw a link between the doctrine of the margin of appreciation and, more specifically, the implicit award of a wide margin to States, and the tenability of marriage as a conventional feature of parenthood.

Although it was not explicitly relied on in the rest of the case-law (with the exception of *Fretté*¹⁴⁷¹), the doctrine of the margin of appreciation has possibly remained constantly present in the back of the Court's mind, even when a violation was found. Different from the perspective of analysis adopted in the case of *Fretté*, in the cases of *E.B. v France* and *X and Others v Austria* (concerning the applicants' comparison with heterosexual unmarried couples), the issue addressed by the Court was not whether single homosexuals or same-sex couples should be given access to adoption, but rather whether the difference in treatment between homosexual single individuals/couples and their heterosexual counterparts was justified under the Convention. The reason why the Court found the refusal to authorise adoption to a single lesbian woman and to the stable partner of the child's mother in breach of the Convention is, to a great extent, attributable to the magnifying effect of Article 14.

Indeed, as expressly stated in the judgment of *E.B.*, the prohibition of discrimination under Article 14 extends beyond the enjoyment of the rights and freedoms enshrined in the Convention and it applies also to those additional rights, falling within the general scope of any Article in the

¹⁴⁷¹ *Fretté*, para 41.

Convention, which the State has voluntarily decided to guarantee.¹⁴⁷² Therefore, the finding of a violation should not be read as stating the State's duty to recognise the right to adopt as an integral part of Article 8. Rather, although the existence or non-existence of a common ground among the laws of the Contracting States is not explicitly considered, national choices in the domain of homosexuality continue to be respected, provided that they do not give rise to discriminatory treatment within the meaning of Article 14.

Finally, it seems important to observe that, in the above jurisprudence, the child's interests have been largely ignored or, at best, given a 'subjective' interpretation and, therefore, "invoked as a self-serving principle"¹⁴⁷³ by the Court to gain legitimacy for its decisions. The judgment in *Salgueiro*, despite its positive outcome, fails to consider the implications of the refusal to grant custody to the applicant on the interests of the child. Given his status of single homosexual man, Mr Fretté's personal qualities and aptitude for childrearing were left out of the equation when determining the best interests of the child. In the case of *E.B.*, the Court decided to pick and chose the elements in assessing whether authorising the applicant to single-parent adoption was in the best interests of the child. While her personal qualities and aptitude for childrearing were held relevant and taken into account, the attitude of Ms E.B.'s partner was attached no weight. In the case of *Gas and Dubois v France*, the child's best interests were not considered at all. In fact, the finding of no violation reveals a total lack of consideration for the on-going cohabitation of the couple and child and, more importantly, for the existence of personal ties among them.

Differently, in the most recent case of *X and Others v Austria*, one of the grounds whereby a violation was found was that the Austrian Government had failed to provide evidence to show that it would be detrimental to the child to be raised by a same-sex couple or to have two mothers and two fathers for legal purposes. However, given the privileged status of marriage, the Court raised the need for an assessment of the best interests of the child, only when comparing the applicants' situation with unmarried heterosexual couples in which one partner wished to adopt the other partner's child. This amounts to a presumption in favour of the best interests of the child in cases of requests for second-parent adoption submitted by married couples. In other words, second-parent adoption by a spouse is *a priori* assumed to be in the child's best interests, with no need for prior assessment. As argued by Wald, also within the Court's jurisprudence, "(...) the

¹⁴⁷² *E.B.*, para 49; *X and Others*, para 145.

¹⁴⁷³ M. Guggenheim, *What's Wrong with Children's Rights* (Harvard University Press, 2005), 157.

interests of children often get lost in debates that really are about adults' vision of the good society."¹⁴⁷⁴

¹⁴⁷⁴ Wald, 'State Determinations Regarding Placement of Children', 434.

CONCLUSIONS

The present concluding chapter takes us back to the core research questions, outlined in Chapter 1, and attempt to summarise how the Court has positioned itself, identifying trends and potential inconsistencies.

1. What features of conventional fatherhood are affirmed, revised or abandoned?

Overall, rather than departing from a conventional understanding of fatherhood, the Court tends to simply add a new layer to it: the father's interest and commitment to the child, which resonates with either the provision of care or the expression of nurturing intentions. Therefore, it would seem that, at least within the first three case-law domains (ART, unmarried fatherhood, and family-work reconciliation), the Court gets close to the ideology of 'new fatherhood', as it combines conventional features and roles of fatherhood with an increased importance attached to the 'new' element of care. Leaving aside the exception of *Paradiso and Campanelli v Italy* (where the biological link was held irrelevant) the jurisprudence pertaining to ART confirms the persistence of biology, marriage and heteronormativity as relevant factors to determine whether the right to respect for private or family life of the applicants was breached or not. At the same time, however, the Court begins to – more or less explicitly – direct some attention to whether close personal ties existed (*X, Y and Z v UK*, *Mennesson v France* and *Labassee v France*, *Paradiso and Campanelli*) or could potentially develop (*Evans v UK*, *Dickson v UK*) between the father and his (prospective) child.

In the context of unmarried fatherhood, different from the trends identified at the national level, biology has not substituted marriage as a connector between fathers and their children. Rather, the Court has adopted a 'genetics plus scrutiny' approach (with the exception of *Schneider*, where the child's paternity was uncertain), according to which biology remains a relevant factor, but the allocation of contact and residence rights is further contingent on the assessment of the concreteness of the father's ties with his child and his parental suitability. To verify whether this additional condition is met, the Court places emphasis on the nature and the length of the interparental relationship, coupled with the father's caring intentions and, whenever available, his actual involvement in the child's life. Hence, biology shares the stage with a revisited form of marital fatherhood and an increased appreciation of the father's interest and commitment.

Similarly, in the family-work reconciliation domain, the definition of fatherhood endorsed by the Court does not abandon the father's traditional role as provider, but rather combines it with caring responsibilities through the take-up of parental leave.

Thus, in the abovementioned three domains, the definition of fatherhood endorsed by the Court is made of both change and continuity. This mix of conventional and new does not seem to characterise the construction of fatherhood and, more generally, of parenthood that emerges from the jurisprudence pertaining to homo-parenthood. Indeed, with respect to homosexual applicants, the 'new' element of (potential) nurture is valued only to a limited extent. More precisely, the (potential) provision of nurture is considered relevant to find a violation only when the heterosexual counterparts of the applicant are entitled to the sought measure (as a result of the employment of Article 14 as a magnifying lens). In the case of *E.B. v France*, the applicant's personal qualities and aptitude for bringing up a child were attached weight, only because French law allowed single-parent adoption. Similarly, in the case of *X and Others v Austria*, the existence of *de facto* family ties between the applicants was deemed relevant only inasmuch as Austrian law enabled unmarried heterosexual couples to access second-parent adoption.

The conditional nature of the importance placed on nurture, in turn, reveals only a partial departure from the norm of heterosexuality. Indeed, whenever the applicants' counterparts are a married couple, the special status of marriage rules out placing any weight on existing *de facto* family ties. Hence, the overcoming of heterosexuality has occurred only outside the domain of marriage. And, when marriage is at stake, the Court's attachment to heterosexuality is kept alive by holding the special status of marriage as a valid reason for justifying a difference in treatment against homosexuals. Therefore, the definition of fatherhood endorsed by the Court within the case-law pertaining to homo-parenthood is either conventional or not. When the Court reaffirms a heteronormative vision of fatherhood/parenthood (*Fretté v France*, *Gas and Dubois v France* and *X and Others*, concerning the applicants' comparison with heterosexual married couples), it – more or less explicitly – holds heterosexuality and marriage as relevant factors and leaves no space for the new element of nurture. On the contrary, when homosexuality is not viewed as lacking suitability for fatherhood/parenthood (*Salgueiro da Silva Mouta v Portugal*, *E.B.* and *X and Others*, concerning the applicants' comparison with heterosexual unmarried couples), nurture is deemed relevant.

The non-concomitance of change and continuity within this case-law domain is due to the particularly problematic coexistence of homosexuality and the conventional ideology of fatherhood. Indeed, as previously noted, homosexuality undermines the conventional ideology of fatherhood almost in its entirety: it implies biological unrelatedness; most likely, also the absence of a marital relationship between the parents and, for certain, a departure from a gendered division of labour. The other sociological transformations do not necessarily generate the same gap between the evolving social reality and the conventional ideology of fatherhood. Fatherhood out of wedlock, for instance, implies a departure from a marital understanding of fatherhood, but generally not from the norm of biology. Similarly, the employment of ART is likely to challenge a biological definition of fatherhood, but does not necessarily exclude the existence of marital ties with the parents of the child. Again, increased participation of women in the workplace is likely to undermine the male breadwinner model, but normally leaves the biological link between the father and the child as well as the marital or pseudo-marital relationship between the parents intact. In other words, while the advent of these three sociological changes have enabled the Court to remain anchored to some conventional features, as well as appreciating the new element of nurture, homosexuality challenges the conventional ideology of fatherhood in such a holistic manner to make the endorsement of mixed definitions (the coexistence of conventional features and the ‘new’ element of nurture) hardly possible.

Finally, the degree of persistence of certain conventional features seems to be determined by the extent to which positive obligations are held applicable. The judgments in the cases of *X, Y and Z*, *Mennesson* and *Labassee* (concerning the applicants’ right to respect for family life), *Söderbäck v Sweden*, *Gas and Dubois* and *X and Others* (concerning the applicants’ comparison with heterosexual married couples) exemplify the Court’s trend of ruling out the application of States’ positive duties to act in a manner that enables those involved to enjoy their family life and to provide legal safeguards to ensure the child’s integration within his/her family as soon as practicable, as the family arrangements at stake become further removed from the conventional family.¹⁴⁷⁵ In all these cases, the applicants found themselves in a paradoxical position, where the Court recognised the existence of *de facto* family ties (and thus, held Article 8, taken alone or in conjunction with Article 14, applicable), but chose not to recognise a right to enjoy their family

¹⁴⁷⁵ U. Kil Kelly, ‘Protecting children’s rights under the ECHR: the role of positive obligations’ 2010 61(3) *Northern Ireland Legal Quarterly* 254.

life.¹⁴⁷⁶ The fact that the relationships between the applicants qualified as ‘family life’ under Article 8(1), but were not granted active respect, amounts to restating the relevance of the conventional features these families lacked: biological relatedness in the cases of *X, Y and Z* and *Mennesson* and *Labassee*; the existence of a stable and committed relationship between the biological parents at the time of conception or childbirth in the case of *Söderbäck*; biology and compliance with heteronormative standards (including marriage), in the case of *X, Y and Z*; and marriage, in the cases of *Gas and Dubois* and *X and Others*. In the latter, the Court explicitly “finds force”¹⁴⁷⁷ in the applicants’ submission that *de facto* same-sex families exist but are denied the possibility of protection and recognition.

Biology

The relevance of the biological link between a father and his child to determine whether the refusal to confer the status of legal father or parental rights on the applicant father violates the Convention has been discussed only within the contexts of ART (Chapter 2) and unmarried fatherhood (Chapter 3). The overall picture seems to indicate a persisting attachment to a biological understanding of fatherhood but, at the same time, its insufficiency in establishing the existence of family life and, even more so, the finding of a violation.

In the case of *X, Y and Z*, the crucial question was whether, once the existence of a family tie with a child had been established, the State’s positive obligation to act in a manner calculated to enable those involved to lead a normal family life could be expected to apply, even if different from its previous case-law, the family ties at stake did not involve biological parents and their offspring.¹⁴⁷⁸ The Court answered this question negatively and, more specifically, it concluded that “Article 8 cannot, in this context, be taken to imply an obligation for the respondent State formally to recognise as the father of a child a person who is not the biological father”.¹⁴⁷⁹ Given that the lack of a biological connection between *X* and *Z* was identified as one of the distinguishing factors between the present case and the previous case-law (in primis, *Marckx v Belgium*), it can be argued that biology was held essential to provide an existing family tie with legal recognition and, accordingly, indispensable for securing the allocation of the legal status of fatherhood.

¹⁴⁷⁶ E. Kukura, ‘Finding family: considering the recognition of same-sex families in International Human Rights Law and the European Court of Human Rights’ 2006 13 *Human Rights Briefs* 19.

¹⁴⁷⁷ *X and Others v Austria*, para 145.

¹⁴⁷⁸ *X, Y and Z v UK*, para 43.

¹⁴⁷⁹ *Ibid*, para 52.

Similar considerations can be drawn from the judgments in the cases of *Mennesson* and *Labassee*. Indeed, it was precisely the existence of a biological link between the intended father (one of the applicants) and the surrogacy-born children that led to a violation of the latter's right to respect for private life. Although the violation was found with respect to the rights of children and under the limb of private life, given the bilateral nature of the tie of filiation, the recognition of the father-child tie has inevitable spillovers on the father's right to respect for family life.¹⁴⁸⁰ Therefore, holding that the legal recognition of biological parentage is a prerequisite for ensuring the respect for the children's private life and, more generally, the realisation of their best interests amounts to a reinstatement of a biological construction of fatherhood.

Leaving aside the case of *Schneider v Germany* (which will be discussed later), fathers continue to be valued by virtue of their biological connection with their children, also in the post-separation context. In the cases of *Keegan v Ireland*, *Görgülü v Germany* and *K.A.B. v Spain* (concerning the placement of children for adoption without the biological father's knowledge and consent), the Court consistently stated that Article 8 incorporates a right for natural fathers to have measures taken with a view of facilitating their reunification with their children and, accordingly, a positive duty on the States to protect the integrity of family ties by taking such steps.¹⁴⁸¹ The essence of this positive obligation seems to reflect a biological conception of fatherhood. In other words, by arguing that the tie between an unmarried father and his child should be protected against irreversible processes, like those triggered by adoption, and holding that States have the positive obligation to facilitate the reunion between a natural father and his child, the Court seems to be of the opinion that a child shall be raised by his/her biological parents and, accordingly, that States should nurture the development of biological ties. In the case of *Görgülü*, the Court also explicitly referred to the biological kinship between the applicant and his child, together with former's willingness and ability to look after the child, to conclude that national authorities had failed to examine all possible solutions to the problem, thus finding a violation.¹⁴⁸²

The State's obligation to facilitate the reunion of a natural father with his child was held applicable to all cases concerning secret placement, with the exception of *Söderbäck*. In the latter, the Court concluded that granting the adoption of a child to the mother's husband did not violate

¹⁴⁸⁰ *Ibid.*

¹⁴⁸¹ *Keegan v Ireland*, paras 50, 55; *Görgülü v Germany*, para 49; *K.A.B. v Spain*, para 95.

¹⁴⁸² *Görgülü v Germany*, para 46.

the right to respect for family life of the applicant – despite the biological link with his child – on grounds of the limited contact between him and his child. Therefore, the non-applicability of the positive obligation should not be read as a departure from biological fatherhood, but rather as expressing the insufficiency of biology *per se*. The limits of biological relatedness and need for additional factors was expressly confirmed in the judgment of *Lebbink v the Netherlands*, where, similar to the applicant, the Court expressed its disagreement over the fact that “a mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship, should be regarded as sufficient to attract the protection of Article 8”.¹⁴⁸³

Although not expressly mentioned, biology seems to remain central also in the cases of *Sahin v Germany* and *Zaunegger v Germany*. Indeed, had the applicants not been the biological fathers, it is doubtful whether the existence of family life between them and their children would have been automatically established. Against this trend, however, the judgments in *Schneider* and *Paradiso and Campanelli* seem to point in a different direction. In the latter, although not yet final, the Chamber’s decision explicitly ruled out biological parentage as essential to serve the child’s best interests and, therefore, to determine whether the child’s removal from his intended parents and his placement with alternative carers due to the lack of biological relatedness breached the applicants’ right to respect for family life. Firstly, the lack of biological relatedness did not prevent the establishment of family life, even if the applicants had cohabitated for approximately six months only. However, this cannot be considered totally new in light of the judgment in *X, Y and Z*. More importantly, although the judgment focuses on the issue of the child’s removal and his placement under guardianship (different from the *Mennesson* and *Labassee* cases), the Court seems to argue that the right to respect for family life and, more specifically, the right to have *de facto* ties preserved, does not presuppose the existence of a biological connection.

Even before the recent judgment in *Paradiso and Campanelli*, the Court had implicitly stated the irrelevance of biological relatedness to assess whether the refusal to grant contact rights to an unmarried father breached his right to respect for family life, in the case of *Schneider v Germany*. In the latter, the Court found a violation of Article 8 on the ground that national

¹⁴⁸³ *Lebbink v the Netherlands*, para 37. A similar statement was made even earlier in the case of *J.R.M. v the Netherlands*, concerning a sperm donor who wished to obtain contact rights with respect to his biological child, against the will of the intended parents (a lesbian couple). In this case, the Commission held that “the situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child” (Under the law, para 1).

authorities had failed to examine whether granting contact rights to the applicant (allegedly biological father of a child born out of wedlock) was in the child's best interests, having regard to the particular circumstances of the case. Since the child's paternity had not been established, the Court seems to admit the possibility for a violation to be found even in the absence of a biological connection. Thus, it would seem that, within the specific case of *Schneider*, biological relatedness is considered irrelevant to establish whether the applicant's complaint falls within the notion of family life and, ultimately, whether the refusal of contact arrangements breaches his right to respect for family life. In both *Paradiso and Campanelli* and *Schneider*, the Court, therefore, seems to accept the detachment of the child's best interests from his biological parentage and to hold that, given the existence of *de facto* family ties between the applicants and their children, the continuation of the child's cohabitation with his intended/social parents and the request for contact rights should be (at least) considered, even in the absence of a biological link.

Marriage

The jurisprudence analysed continues to be marked by a persisting attachment to a marital or pseudo-marital conception of fatherhood. While the protection of the marital family remains a legitimate reason for discriminating against individuals not complying with heteronormative standards, in the domain of heterosexuality, marriage persists but in a revisited and milder form. In other words, while the existence of a (past) stable and committed relationship between the parents might suffice, together with the father's demonstrated interest and commitment to the child and the existence of a biological connection, to determine the conferral of parental rights (contact and residence rights) on an unmarried father, the same cannot be observed with respect to same-sex couples. Not even when the child has lived with the applicants since his/her birth and therefore concrete family ties (and not only intentions) exist between the couple and the child, like in the cases of *Gas and Dubois* and *X and Others*.

The special status of marriage remains a stumbling block for the Court's development of a notion of substantive equality to the advantage of same-sex couples. The right to adopt is not protected by Article 8 *per se*; but only when Article 14 is invoked. When the comparator is a married couple, however, the Court has not yet employed Article 14 as a magnifying lens to cover additional rights voluntarily provided by States. Accordingly, in line with the solution adopted in *Shalk and Kopf v Austria*, in the case-law concerning second-parent adoption, the Court does not undertake any critical consideration of either the institution of marriage and or the 'assumed

reality' underlying same-sex couples' exclusion from the option of second-parent adoption and, as such, it reproduces a heteronormative interpretation of marriage. As a result, the conferral of parental status on homosexuals remains, at least partially, contingent on the existence of marital ties between the parents. This explains also why, in the case of *Salgueiro v Portugal*, the refusal to award parental responsibility to a biological father of a child born from a previous heterosexual marriage on the ground of his sexual orientation was considered to violate Article 14 taken in conjunction with Article 8.

The persistence of a marital conception of fatherhood outside the domain of heteronormativity is further demonstrated by the judgment in *X, Y and Z*. Among the arguments advanced by the Court, it was pointed out that allowing the recognition of X as a child's legal father while prohibiting X and Y to marry each other would have produced a contradiction within the national legal system. In so arguing, the Court seems to implicitly favour a conception of fatherhood as a derivative of marriage: in other words, it appears to suggest that the regulation of father-child relationships depends on whether the relationship between the parents is formalised or can potentially be formalised through marriage. As a result, contrary to what has happened to the benefit of unmarried heterosexual fathers, enduring cohabitation and the existence of *de facto* family ties, unless formalised through marriage, have not yet proved decisive in reducing the distance between unmarried homosexual couples and married couples with respect to the attribution of parental status.

Moving within the context of heterosexuality, marriage has been replaced by alternative organising concepts, such as cohabitation, length and stability, in line with the account provided by Collier.¹⁴⁸⁴ Therefore, the Court continues to construct fatherhood as derivative of the interparental relationship, but in pseudo-marital terms. In the domain of ART, the persisting relevance of the relationship between the parents emerges as an uncontroversial fact from the comparison between the outcomes of *Evans* and *Dickson*. Although advancing the same claim, the refusal to grant Mr and Mrs Dickson artificial insemination facilities was considered to infringe upon the respect for their decision to become genetic parents. Differently, the decision to prohibit the use of stored eggs by Ms Evans was held not to breach her right to respect for her private life, but rather to strike a fair balance between the various and competing interests involved, *in primis* J.'s right to respect for his decision not to become a parent. Thus, the family contexts that the

¹⁴⁸⁴ R. Collier, *Masculinity, Law and the Family* (Routledge, 1995), 205.

aspiring parents would have provided the child with seem to have played a decisive role in determining the different outcomes. While Mr and Mrs Dickson were married, Ms Evans had no intact relationship with the biological father of the desired child. Hence, the Court seems to favour marital fatherhood, broadly interpreted as fatherhood that depends on existing marital or similar ties between the father and the child's mother.

In the domain of unmarried fatherhood, it is the duration and the nature of the mother-father relationship – *inter alia*, whether it entailed cohabitation and they had planned to have a child – that are attached – implicit or explicit – weight. These elements have proved relevant to establish both whether the relationship between an unmarried father and his child born out of wedlock could qualify as 'family life' and whether a violation occurred. More specifically, in this jurisprudential area, the Court seems to operate in accordance with a presumption connecting causal sex with irresponsible fatherhood and sexual encounters that occurred within a more stable and committed relationship with responsible fatherhood. Therefore, the existence of a stable relationship between the biological parents at the time of conception or childbirth is employed as a criterion for testing the genuine interest of the father in maintaining or developing a tie with his child.

While the interparental relationship is explicitly mentioned as relevant in the cases involving fathers seeking to obtain contact and residence rights against the mother's will, in the other set of cases brought by unmarried fathers, the endorsement of a pseudo-marital conception of fatherhood is less obvious. Apart from in the case of *Keegan*, where the existence of family life between the father and his child is constructed as a direct consequence of the mother-father relationship,¹⁴⁸⁵ explicit references to the mother-father relationship *prima facie* seem to give way to an increased appreciation of the father-child tie. However, the tenacious hold of a pseudo-marital conception of fatherhood is confirmed by the application of the State's positive duty to facilitate the father-child reunion in all but the case of *Söderbäck*, where the parents were simply friends. In line with the previously identified presumption, this judgment seems to state that, if the child is not born within a stable and committed relationship, the father does not have the right to have his potential ties with the child protected and, consequently, the State is not under the obligation to

¹⁴⁸⁵ More specifically, it was underlined that the relationship between the applicant and the child's mother lasted for two years, during one of which they cohabited. Moreover, it was noted that the conception of the child was the result of a deliberate decision and that the biological parents had also planned to get married. Given that the parents' relationship had the hallmark of family life for the purposes of Article 8, the Court concluded that from the moment of the child's birth there existed between the applicant and his daughter a bond amounting to family life (para 45).

prevent future ties between a father and his child from being jeopardized by the mere passage of time.

To conclude, it is important to recall that, although kept alive, revisited marital fatherhood does not stand alone in the context of unmarried fatherhood. Rather, in addition to biology (with the exception of *Schneider*), it tends to be accompanied by evidence of the father's interest and commitment to the child in order to prove the untenability of gender stereotypes. Hence, the definition of fatherhood endorsed by the Court is a derivative of both conventional features – *in primis*, the interparental relationship – and the 'new' element of nurture or nurturing intentions. As an example, in the case of *Sahin*, the Court held that general assumptions, which label all unmarried fathers as uninterested and irresponsible, did not apply to the applicant, since, *inter alia*, "he had in fact been living with the mother at the time of the child's birth" and "more importantly, he had continued to show concrete interest in contact with her (the child) for sincere motives."¹⁴⁸⁶ Although less explicitly, the same combination of elements appear to have determined the final outcome in the case of *Söderbäck*. In addition to the absence of a steady relationship with the child's mother, the insufficient frequency and intensity of the contact between the applicant and his child led to the conclusion that granting the child's adoption to the mother's husband did not breach the biological father's right to respect for family life.

Breadwinning

In the terrain of family-work reconciliation, the Court departs from a conventional conception that views the father as just the breadwinner. In so doing, however, it does not free fathers from their traditional role of providers; rather, it supports a more balanced division of labour between men and women, according to which fathers are also required to undertake childcare duties. Hence, the

¹⁴⁸⁶ *Sahin v Germany* (Chamber), paras 58-59. Other examples can be found in the case of *Lebbink v the Netherlands*, paras 38-39: "[I]n the instant case the Court notes that Amber was born out of a genuine relationship between the applicant and Ms B. that lasted for about three years (...). The Court further notes that, although the applicant never cohabited with Ms B. and Amber, he had been present when Amber was born, that – as from Amber's birth until August 1996 when his relation with Amber's mother ended – he visited Ms B. and Amber at unspecified regular intervals, that he changed Amber's nappy a few times and baby-sat her once or twice, and that he had several contacts with Ms B. about Amber's impaired hearing." In the case of *Zaunegger v Germany*, para 57: "[H]e lived together with the mother and the child until the child reached the age of three and a half and for an additional two years following the parents' separation, more than five years in total. After the child had moved to live with her mother, the father still enjoyed extensive contact rights and provided for the child's daily needs."; in the case of *Schneider v Germany*, paras 88-89: "Even though the applicant and Mrs H. never moved in together, it is uncontested that they had a relationship for one year and four months – which was thus not merely haphazard (...). Moreover, the Court must have regard, in particular, to the interest in and commitment by the applicant to F. both before and after his birth."

resulting construction of fatherhood gets closer to the ideology of ‘new fatherhood’, since it maintains the father’s role in paid employment but also adds ‘new’ caring responsibilities. Against this development, in the domain of homosexuality, it appears that the Court’s reasoning is still informed by the man-breadwinner/woman-homemaker stereotype. Having regard to the opposite outcomes in the cases of *Fretté* and *E.B.*, the Court seemingly continues to support a gendered division of labour and, on the basis of that, to value the nurturing abilities of lesbians and gay males differently.

Heterosexuality/Heteronormativity

In *X, Y and Z*, X’s lack of compliance with heteronormativity lies at the core of the finding of a non-violation. His gender identity and, as a result, his impossibility to biologically contribute to the child’s conception and to get married to Y (together with the lack of consensus), ruled out the application of the State’s positive duty to legally recognise the social tie between X and Z. The Court’s attachment to a heteronormative framework emerges even more clearly in the case-law concerning homo-parenthood. In the case of *Gas and Dubois* and *X and Others* (concerning the applicants’ comparison with married couples), the Court resorts to deeply entrenched heteronormative standards to justify the States’ enjoyment of a wide margin of appreciation to preserve differential treatment on grounds of sexual orientation with respect to marriage (in line with *Shalk and Kopf*) and, as a result, to second-parent adoption.

Concerning heterosexuality strictly speaking, its relevance as a conventional feature of parenthood has been ruled out, but only to a certain extent. The outcomes in *Salgueiro*, *E.B.* and *X and Others* (concerning the applicants’ comparison with unmarried heterosexual couples) inevitably suggest that heterosexuality is no longer necessary to make someone a legal father and, thus, homosexuality *per se* is no longer legitimately considered a cause of parental unfitness and discrimination within the meaning of Article 14. However, a more attentive analysis of the reasoning underlying the finding of a violation in *Salgueiro* (especially in light of the subsequent case of *Fretté*), coupled with the judgments in *Gas and Dubois* and *X and Others* (concerning the applicants’ comparison with married couples), seem to reveal that heterosexuality is not totally overturned, but rather is kept alive through the maintenance of special regimes for married couples as compatible with the Convention.

2. How does the Court (fails to) deal with the concept of fragmented fatherhood?

The Court has not shown itself prepared to react to the realities of fragmented fatherhood in a consistent manner. While it seemingly opposes the split of nurture and biology between two father figures in the domain of ART, when considering applications brought by unmarried fathers, the Court has proved able to exit a dual-parental scheme, which is made up of one mother and one father. In the case of *Evans v UK*, the conceptualisation of fatherhood as a unitary status goes hand-in-hand with the Court's adherence to the ideology of new fatherhood. By stating that by allowing Ms Evans to use stored eggs against the will of J. would have resulted in forcing J. into fatherhood, the Court does not seem to contemplate the possibility of separating biology, marriage and care and these contributions being offered by different men. The same approach can be found in the case of *Dickson*, with the sole difference that fatherhood does not seem to require the effective provision of care from the very beginning; rather, the combination of biology and marriage, together with nurturing intentions is sufficient to get a parental project started.

Equally, in the case of *X, Y and Z*, although allowing fragmentation for the purpose of establishing the existence of family life, the Court ultimately upholds a unitary definition of fatherhood, which presupposes the coexistence of conventional features – a biological link, a marital relationship between the parents and heteronormativity – and the 'new' element of care within the same individual. Similarly, moving to the domain of surrogacy, the judgments in *Mennesson* and *Labassee* seem to convey, *inter alia*, the message that legal parentage should reflect biological parentage in order to ensure the protection of the children's right to an identity. Therefore, in these cases, a violation (although from the perspective of children, but with inevitable repercussions on the father's position) was found with respect to a tie that connected a child with his biological, social and married father.

Therefore, it can be observed that, when it is the full legal status of fatherhood that is debated, the Court has shown a certain willingness to maintain the paternal figure as compact as possible, in line with the conventional ideology of fatherhood. Against this trend, however, the recent judgment in *Paradiso and Campanelli* openly accepts the possibility that a child is biologically related to one man and one woman but is, at the same time, cared for by another set of parents. As such, the approach adopted in *Paradiso and Campanelli* appears more similar to the construction of fatherhood emerging from the cases involving a tension between an unmarried father (the applicant) and another parental figure.

In both *Schneider* and *Söderbäck*, the Court showed greater flexibility – if compared to the ART-related cases – in allowing the participation of a third party external to the dual parental family in the child’s life. In *Schneider*, the finding of a violation amounts to the Court stating that although the child is raised by another father figure, who is the mother’s husband, granting contact arrangements to the child’s (allegedly) biological father might still serve the child’s best interests. In so arguing, the Court accepted the coexistence of two paternal figures in the child’s life: the legal/social father and the (allegedly) biological father who enjoys ‘intended’ family ties with the child.

A similar openness to fragmented fatherhood can be inferred from the outcome in the case of *Söderbäck*. Although the Court ultimately found no violation, by granting adoption to the mother’s husband, which was considered not to breach the applicant’s right to respect for family life, this amounts to acceptance that a child might have one biological father and one nurturing/marital and possibly legal father, simultaneously. Thus, with the exception of *Paradiso and Campanelli*, it would seem that when the Court has to make a decision concerning the award of parental rights, as opposed to the full status of legal fatherhood, it overcomes the assumption of exclusivity more easily and, accordingly, is more tolerant of the fragmentation of fatherhood, provided that the coexistence of more than one paternal figure serves the child’s best interests.

The Court’s readiness to deal with the fragmentation of fatherhood is further put to the test within the jurisprudence pertaining to family-work reconciliation. In this domain, what is subject to challenge and disaggregation is a traditional gendered division of labour and, therefore, the persistence of breadwinning and nurture as two separate roles. In the case of *Markin v Russia* – which is paradigmatic of the Court’s approach to fatherhood in the family-work domain – the provision of parental leave to fathers is viewed as a means of enabling the establishment of a dual breadwinner model. By supporting the idea that men should be as involved as women in taking care of their children in order to, *inter alia*, enable women to pursue their professional ambitions, the Court implicitly accepts the fragmentation of both the conventional role of fathers as the sole breadwinners and the traditional role of mothers as primary caretakers beyond gender lines. As a result, breadwinning and nurture are no longer viewed as exclusively paternal (and masculine) and maternal (and feminine), respectively; rather, the Court supports the degendering of both functions and, accordingly, their split between men and women.

Finally, having regard to the jurisprudence pertaining to homo-parenthood, the Court was only given a chance to accept fragmented fatherhood in *Salgueiro*. Indeed, while the cases of *E.B.*, *Gas and Dubois* and *X and Others* involve lesbian women, Mr Fretté did not possess one single conventional feature of fatherhood and, as such, fragmentation was not an option. In the case of *Salgueiro*, by finding the refusal to grant custody to the applicant on grounds of his sexual orientation in breach of the Convention, the Court implicitly accepts that biology and nurture can exist separately from heterosexuality. Although the type of fragmentation at stake is of a different nature – since it does not involve a split of paternal functions between two individuals – the judgment in *Salgueiro* resembles the approach taken in *Schneider* as well as in *Söderbäck*, inasmuch as the failed coexistence of all conventional features within the same individual does not prevent the allocation of parental rights on the applicant.

3. Does the Court understand the law as a reflective or a transformative tool? And, what is the role of the doctrine of the margin of appreciation and of the interpretation of the Convention as a living instrument in supporting one or the other conception of the law?

The Court's understanding of the role of the law comes into play *vis-à-vis* two distinct phenomena: societal dynamics and national legal realities. Therefore, the above question can be divided in two sub-questions: firstly, does the Court conceive the law as destined to fight gender stereotypes and affirm a new vision of fatherhood or rather to reflect and compensate for existing gender role differences?; secondly, does the Court believe that its interpretation of the Convention should reflect national legal systems or, rather, impose new legal conditions and push for legal changes whenever this is considered necessary? Therefore, while the first sub-question is closely connected to the potential adoption of an anti-stereotyping approach, the Court's reliance on the rule of consensus and, more generally, on the doctrines of the margin of appreciation and the interpretation of the Convention as a living instrument are key factors when addressing the second sub-question.

The first sub-question becomes particularly relevant in the domains of unmarried fatherhood, family-work reconciliation and, although only to a certain extent, homo-parenthood, where the adoption of an anti-stereotyping approach is indicative of the employment of the law as a tool for asserting a new definition of fatherhood untied from stereotypical notions. By fighting stereotypes underlying national legal provisions and judgments, the Court accepts the idea that

unmarried fathers might be as interested in developing or maintaining a relationship with their children as divorced fathers or unmarried mothers and that, more generally, fathers might be as capable as mothers to take care of children. Despite the Court's ambition to free the legal regulation of fatherhood from gender stereotypes, the emerging redefinition of fatherhood remains grounded on a fact-based assessment of the case, at least within the domain of unmarried fatherhood. Indeed, the Court tries to challenge stereotypical assumptions by placing emphasis on the specific circumstances of the case and, more specifically, on the father's demonstrated interest and commitment to his child, the nature and the length of the mother-father relationship and the existence of a biological link between the father and his child born out of wedlock.

The same exact approach, however, is not mirrored in the jurisprudence pertaining to family-work reconciliation. In the case of *Markin* (similar to the previous cases), despite the comprehensive factual account at its disposal, the Court did not tackle the personal situation of the applicant and made rather abstract remarks. More specifically, it stated that parental leave policies that exclude fathers are liable to reproduce gender stereotypes, which are detrimental to both women's professional lives and men's family lives. Thus, despite the significant anti-stereotyping efforts deployed, the conclusion that the refusal of granting parental leave to Mr Markin breached his right to respect for family life, in conjunction with Article 14, appears to rest on aspirational standards of gender equality (although applicable to the applicant's particular situation), more than on the applicants' particular situation.

The case-law pertaining to homo-parenthood is characterised by a mixed approach, in at least two respects. Firstly, in those cases where Article 14 was employed as a "magnifying lens" – namely in *Salgueiro, E.B.* and *X and Others* (concerning the applicants' comparison with heterosexual unmarried couples), the Court attempted to establish a new vision of fatherhood/parenthood by undertaking an anti-stereotyping analysis. In contrast, when the Court did not avail itself of such doctrinal development, it consequently did not embark on a critical assessment of the circumstances of the case and, more broadly, of the institution of marriage. In so doing, it failed to contest stereotypical notions that deem homosexual men unfit for parenthood (*Fretté*) and marriage as the most stable framework for raising children (*Gas and Dubois, X and Others*).

Secondly, while in the case of *Salgueiro*, the Court's anti-stereotyping attitude translates into dismissing sexual orientation as a legitimate ground for discrimination, in the following two

cases, it is further enriched by references to the specific circumstances of the case. In the case of *E.B.*, the Court held that the reasons put forward by the Government could not be considered as particularly convincing and weighty to justify the refusal to grant the permission to adopt. Furthermore, just prior to stating the finding of a violation, the Court stressed the applicant's personal qualities and aptitude for raising children to prove the compatibility of the sought adoption with the child's best interests. In the case of *X and Others* (concerning the applicants' comparison with unmarried heterosexual couples), the finding of a violation is based on the following considerations: the existence of *de facto* family life between the applicants and the lack of evidence produced by the Government to demonstrate that being raised by a same-sex couple or having two legal fathers or two legal mothers would run counter the child's best interests. Therefore, while the finding of a violation in *Salgueiro* rests on rather aspirational standards of equality, in the cases of *E.B.* and *X and Others* (concerning the applicants' comparison with heterosexual unmarried couples), the Court seeks to propose a new definition of parenthood by calling for an individual assessment of the case.

As acknowledged by the concurring Judges Costa and Spielmann in *Gas and Dubois*, the abstinence of the Court from carrying out an individual analysis in the remaining case-law is a direct consequence of the Court's fear of finding itself out of step with national choices concerning the family, parent-child relationships and the concept of marriage. Although marriage has undergone significant social changes since the adoption of the Convention (and this was expressly recognised by the Court itself), the Court continues to believe that tradition has not yet been transformed enough to allow for the imposition of new legal conditions.¹⁴⁸⁷ As a result, States continue to be – more or less explicitly – accorded a wide margin of appreciation and the Court evades its duty to revise the compatibility of national solutions with the Convention. As such, this cautious approach represents the natural continuation of the position held in the case of *Shalk and Kopf*, where, given the deep-rooted social and cultural connotations of marriage in Europe, the Court felt that it should not rush to replace the legal provisions of national authorities, who are better placed to assess the needs of society.¹⁴⁸⁸

¹⁴⁸⁷ P. Johnson, 'Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority' 2011(20) *Social and Legal Studies* 360.

¹⁴⁸⁸ *Shalk and Kopf v Austria*, para 42.

This brings us to the second sub-question, namely whether the interpretation of the Convention proposed by the Court aims at reflecting or, rather, bringing about change in national legislations. For current purposes, another way of framing this question is: to what extent have the doctrine of the margin of appreciation and the interpretation of the Convention as a living instrument contributed to determining the final outcome of a case? Overall, the Court has proved generally hesitant to depart from national approaches and, therefore, cautious to prompt legal change and impose new legal conditions at the national level. This attitude is likely to stem from the Court's awareness as to the repercussions that a less prudent approach would have on the States' willingness to comply with its decision.¹⁴⁸⁹ Therefore, in many cases, the Court has tended to verify, irrespective of a European consensus prior to the case, whether or not a violation has occurred. While the absence of a consensus across the Contracting States has generally implied a wide margin of appreciation for the State and the ultimate finding of a non-violation, the existence of a consensus has normally led to a narrower margin and a violation being found.

Examples of this trend can be identified in all four case-law domains. In case of *X, Y and Z*, for instance, the Court stated that, "given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States",¹⁴⁹⁰ Article 8 could not be interpreted as imposing a positive obligation to provide legal recognition to social ties. In this case, the lack of European consensus triggered the inapplicability of the positive obligation and, consequently, led to holding national decisions in compliance with the Convention.¹⁴⁹¹ In the cases of *Zaunegger* and *Schneider*, regardless of its

¹⁴⁸⁹ J. Gerards, *Judicial Review in Equal Treatment Cases* (Martinus Nijhoff, 2005), 170.

¹⁴⁹⁰ *X, Y and Z v UK*, para 52. Another example is provided by the judgment in the case of *Evans v UK*, paras 78-82. The Court found that, given that the issues at stake were of morally and ethically delicate nature and there was no uniform approach in this field, the State had to be granted a wide margin of appreciation. Furthermore, it anchored the finding of non-violation to the existence of consensus, thus proving cautious in pushing the interpretation of Article 8 beyond national choices.

¹⁴⁹¹ The same reasoning can be found in the judgment of *Mennesson v France*, concerning the applicants' right to respect for family life. On the establishment of consensus, see para 78. The judgment in the case of *Dickson v UK* constitutes further evidence of the Court's reliance on consensus, but through a peculiar path. Although it began by observing that most of the States provided conjugal visits, it did not continue by stating that, as a consequence, the State enjoyed a narrow margin of appreciation. Rather, it held that, given that the Court had never interpreted the Convention as requiring States to provide conjugal visits, access to AI by prisoners was an area in which the Contracting States could enjoy a wide margin of appreciation. Nonetheless, the Court concluded that, given that the policy placed an extraordinarily high 'exceptionality' burden on the applicants, the policy ultimately precluded the assessment of the proportionality of the interference with the rights of the applicant, as required by the Convention. Therefore, although not for the purpose of establishing the width of the margin enjoyed by the State, it would seem that the existence of a certain consensus (most of the States) eventually triggered a strict assessment of proportionality and led to the finding of a violation.

problematic establishment (as pointed out in Chapter 3), the existence of a European common ground among the laws of Contracting States was relied on to advance a dynamic interpretation of the Convention, which takes into account the realities of family life in the 21st century. More specifically, the refusal to grant the applicant contact or joint residence rights with respect to his child born out of wedlock was considered to breach the Convention, as it was grounded on general legal assumptions that no longer responded to the needs of a growing number of unmarried families.

The jurisprudence pertaining to family-work reconciliation is possibly the most representative of the Court's understanding of the role of the Convention as reflecting, more than transforming, national legal realities. The finding of a non-violation in the case of *Petrovic v Austria*, which was overturned in *Markin v Russia*, is explained by the fact that the shift in national legislations that started in the late 1980s was deemed completed in 2012. Accordingly, while the finding of non-violation in *Petrovic* was grounded on the lack of a European common ground in the field of parental leave, in the case of *Markin*, the Government no longer enjoyed a wide margin of appreciation because – as indicated by comparative data – the majority of Contracting States provided parental leave entitlements to both mothers and fathers and, more importantly, to both servicemen and servicewomen.¹⁴⁹² Therefore, it was the changed legislation within the Contracting States and the emergence of a consensus in the field of parental leave that prompted the finding of a violation.

Moreover, it seems relevant to point out that, in the case of *Petrovic*, the importance attached to the absence of consensus went as far as to trump the suspect ground of discrimination (based on sex). Indeed, although the Court called for very weighty reasons to justify a difference in treatment on the basis of sex, it eventually stated that the State enjoyed a wide margin of appreciation due to the lack of a European common ground. Hence, an unconditioned reliance on the consensus can lead to contradicting statements within the same judgment. Although implicit, the same pattern seems to drive the reasoning underlying the judgment in *Fretté*. In this case, the Court chose to prioritise the lack of a European common ground over the suspect nature of the badge of discrimination (sexual orientation) in order to determine the width of the margin enjoyed by the State. More precisely, the Court held that it was not possible to find converging solutions on the issue of adoption by homosexuals either in the legal orders of the Contracting States or in

¹⁴⁹² *Markin v Russia* (Chamber), para 49; *Markin v Russia* (Grand Chamber), para 140.

the scientific community.¹⁴⁹³ The lack of consensus, coupled with the fact that national authorities were considered better placed to assess local needs and values, implied the grant of a wide margin of appreciation to the State and led to the finding of a non-violation. Therefore, just like in *Petrovic*, the reliance on consensus prevailed over the need for weighty reasons owing to the suspect nature of the ground of discrimination under scrutiny (sexual orientation).

In addition to deriving its decision from the existence or non-existence of consensus, the Court sometimes demonstrates respect for national decisions by invoking the doctrine of the margin of appreciation in its structural variant. In the case of *Söderbäck*, for instance, the fact that national authorities were considered better placed to strike a fair balance between the competing interests by virtue of their proximity to all parties involved constituted one of the relevant considerations whereby the grant of adoption to the mother's husband did not violate the applicant's (biological unmarried father) right to respect for family life. Another example is provided by the judgment in *Sahin*, concerning the complaint under Article 8. In this case, despite the general principle whereby restrictions on contact rights call for stricter scrutiny, the Court did not feel prepared to contest the determination of the child's best interests and, more generally, the assessment of the available evidence undertaken by national authorities, in light of their direct contact with the individuals involved. As a result, the refusal to grant the applicant contact rights against the will of the mother was held not to breach Article 8, as the Court had no reason to question the opinion of the national expert who conducted interviews with all parties concerned.¹⁴⁹⁴

Similarly, although not expressly stated by the majority, in the case of *Gas and Dubois*, the role of the doctrine of the margin of appreciation in determining the finding of non-violation was acknowledged by the concurring Judges Costa and Spielmann. The latter argued that national legislators are better positioned than an international court to initiate change in areas concerning the institution of marriage, the family and parent-child relationships. Therefore, the conclusion whereby special regimes for married couples do not amount to discrimination within the meaning of Article 14 appears to rest, even if less explicitly, on the notion that States enjoy a wide margin of appreciation when shaping their social policies. The same can be said in relation to the judgment

¹⁴⁹³ *Fretté v France*, paras 41-42.

¹⁴⁹⁴ *Sahin v Germany* (Grand Chamber), para 76.

in the case of *X and Others* (concerning the applicants' comparison with married couples), as the Court did no more than reiterate its precedent in *Gas and Dubois*.

Leaving aside the methods employed to establish consensus,¹⁴⁹⁵ these examples constitute, at least *prima facie*, evidence of the fact that the Court does not wish to go beyond the will of the Contracting States and, therefore, understands the role of the Convention as being that of reflecting national legal developments. However, there are other cases, where the conception of the law endorsed by the Court is not immediately clear. This category tends to include those judgments, where the final outcome of a violation has very much depended on the Court's employment of Article 14 as a "magnifying lens".¹⁴⁹⁶ As just stated, in the case of *Sahin*, the Court found no violation of Article 8. However, since the contested legislation accorded different treatment among fathers depending on whether their children were born in a marital relationship or outside wedlock, the Court concluded that a violation of Article 14 taken in conjunction with Article 8 had occurred. The same dynamic can be detected in the judgment of *Salgueiro*, where the Court held that the refusal to grant a homosexual divorced father contact with his biological child violated Article 14 in conjunction with Article 8, without a prior assessment of the applicant's complaint under Article 8. In these two cases, therefore, Article 14 served as an aggravating factor.¹⁴⁹⁷ Had the Court applied Article 14 in accordance with its wording and, as such, as an accessory guarantee, it would not have been able to state the applicability of Article 14 and, even more so, to find the contested differential treatment incompatible with the Convention. Moreover, at least in the case of *Sahin*, the employment of Article 14 as a 'magnifying lens' ruled out the applicability of the margin of appreciation, which facilitated the finding of a non-violation with respect to Article 8. In other words, for discrimination purposes, the fact that national authorities were 'better placed' did not matter.

¹⁴⁹⁵ Although the methods of establishment of consensus do not fall within the scope of the current inquiry, it is necessary to bear in mind that the Court's reliance on the existence of a European consensus does not necessarily indicate the Court's effective respect of national solutions. Indeed, the latter very much depends on the methodology employed to establish the existence of consensus and, therefore, to what extent the suggested convergence is based on an accurate comparative analysis. In addition to the remarks made with respect to *Zaunegger* and *Schneider* in Chapter 3, it seems sufficient to observe that, although advanced as one or the sole determining factor in finding non-violation, in the judgments of *X, Y and Z v UK*, *Petrovic v Austria* and *Fretté v France*, the stated absence of consensus precludes from any attempt to identify national legal approaches in the field of interest.

¹⁴⁹⁶ O. Arnardóttir, 'Discrimination as a magnifying lens – Scope and ambit under Article 14 and Protocol No. 12' in E. Brems and J. Gerards (eds.), *Shaping Rights in the ECHR – The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (CUP, 2014), 330-349.

¹⁴⁹⁷ *Ibid.*, 335.

The finding of a violation in the case of *Weller v Hungary* constitutes further evidence of the role played by the magnifying effect of Article 14 in determining the final outcome of a case. Indeed, different from the judgments in *Petrovic* and *Markin*, the refusal to pay a benefit to natural fathers, while available to mothers, adoptive parents and guardians, was considered discriminatory within the meaning of Article 14, even if States provided for widely different social security systems.¹⁴⁹⁸ More specifically, it was held that, whenever a State decides to go beyond the Convention requirements by putting in place a family allowance scheme, it cannot confer benefits in a discriminatory manner. In this case, therefore, the magnifying effect of Article 14 overshadowed the absence of a common European approach and, therefore, the wide margin of appreciation enjoyed by States in shaping their social security systems.

The same kind of magnifying effect led to a violation of Article 14, taken in conjunction with Article 8, in the cases of *E.B.* and *X and Others*, concerning a comparison of the applicants with heterosexual unmarried couples. One of the elements revealing the Court's employment of Article 14 as a magnifying lens lies in the core question identified by the Court, which, in the case of *X and Others*, also resonated with the issue with respect to which consensus was established. In the case of *E.B.*, different from the previous judgment in *Fretté*, the Court did not consider itself called on to decide on the general question as to whether homosexuals should be allowed to adopt, but rather on the narrower issue of discrimination based on sexual orientation. Similarly, in the judgment of *X and Others*, the Court felt the need to specify that the issue to be decided was not the broad question of same-sex couples' access to second-parent adoption, but rather the differential treatment between unmarried heterosexual couples and same-sex couples regarding that type of adoption.¹⁴⁹⁹ When addressing this issue, in both cases, the Court drew on the same argument advanced in *Weller* and stated that, although Article 8 does not incorporate the right to adopt, States cannot provide additional rights in a discriminatory manner. Had the doctrine of non-discrimination not evolved to cover also additional rights voluntarily recognised by States, the Court would have been unable to find a violation of Article 14, taken in conjunction with Article 8.

Moreover, in the case of *E.B.*, the existence or non-existence of consensus was not under consideration at all. This is rather surprising, since it overturned the judgment in *Fretté*, where no

¹⁴⁹⁸ *Weller v Austria*, para 34.

¹⁴⁹⁹ *X and Others v Austria* (Grand Chamber), para 149.

violation was found due to lack of common approach on the issue of adoption by homosexuals. Differently, in the judgment of *X and Others*, the Court touched upon the issue of consensus purely to address the Government's submission that no European consensus existed. It clarified that, being concerned with the narrower question of discrimination, only those States enabling unmarried couples to access second-parent adoption, namely ten, could serve as the basis for comparison; and, given this small sample, it was impossible to establish whether consensus existed or not.¹⁵⁰⁰

In light of the above examples, it seems possible to observe that, whenever Article 14 deploys its magnifying effect, the issue of consensus and, more generally, the margin of appreciation enjoyed by the State become irrelevant. Moreover, having regard to the judgments in *Sahin* and *Weller*, the employment of Article 14 as a magnifying lens seems only to play a temporary role; more specifically, this doctrinal development appears to prove useful when consensus has not yet formed. When consensus can be established, the Court stops relying on the magnifying effect of Article 14 and goes back to the existence of consensus as a way of ascertaining a violation. This trend becomes visible in both contexts of unmarried fatherhood and family-work reconciliation.

In the latter, the judgment in *Weller* operated as a good transition between the finding of non-violation in *Petrovic* and its subsequent overturning in *Markin*. More specifically, given that consensus could not yet be established in 2009, the employment of discrimination as a magnifying lens served as an alternative reasoning to support the finding of a violation. Once most Contracting States provide parental leave to both men and women as well as to both servicemen and servicewomen, the Court ceases to rely on the reinterpreted ambit of Article 14 and the existence of a common approach among Contracting States returns to be relevant and becomes the reason justifying a finding of a violation.

A similar pattern can be detected with regards to the case-law involving unmarried fathers willing to obtain contact and joint residence rights, against the will of the child's mother. As previously argued, the employment of discrimination as an aggravating factor (and, therefore, as a magnifying lens) played a decisive role in determining the finding of a violation of Article 14, taken in conjunction with Article 8, in the case of *Sahin*. Once again, if regard is given to the subsequent case of *Zaunegger*, the Court's recourse to the magnifying effect of Article 14 in *Sahin*

¹⁵⁰⁰ *Ibid.*

seems to have served only temporary purposes, namely the need for an alternative line of reasoning to substantiate the finding of a violation of Article 14, taken in conjunction with Article 8. Indeed, as soon as the Court was able to establish the existence of consensus – namely, in the judgment of *Zaunegger* – it preferred to ground its findings on a dynamic interpretation of the Convention in light of the growing number of unmarried families and the tendency of national legal regimes to base residence determinations on the child's best interests.

Regardless of its short- or long-term function, it remains to be established whether the employment of Article 14 as a magnifying lens is to be read as reflecting or imposing new legal standards on Contracting States. When the ambit of Article 14 is also interpreted as including those additional rights (*Weller, E.B., X and Others* concerning the applicants' comparison with unmarried heterosexual couples), which are voluntarily provided by States, it can be argued that the magnifying effect of Article 14 translates into going beyond the will of the Contracting States, but only to a certain extent. Indeed, up until the moment when neither the right to parental leave nor the right to adopt is protected by Article 8 *per se*, States remain free to introduce legislation that provide for parental leave as well as to allow single-parent adoption and second-parent adoption, or not. Similarly, by finding a violation in the cases of *Sahin* and *Salgueiro*, the Court does not impose new legal conditions, according to which all unmarried fathers should *a priori* be granted contact rights against the will of the child's mother or all homosexual divorced fathers should *a priori* be accorded parental responsibility with respect of their biological children. Rather, in finding a violation, the Court simply imposes new standards of non-discrimination.

Therefore, it can be concluded that the Court has overall proved quite sensitive towards national legal standards by abstaining from imposing new substantive obligations prior to the emergence of a common ground among the laws of Contracting States. Given that the ultimate responsibility for implementing the Convention rests with States, the Court seems to be of the opinion that imposing progressive judgments on unreceptive national authorities does not lead to any advancement in the protection of human rights and might even be counter-productive. At the same time, however, the Court shows itself aware of the potential risk, which would derive from attaching unconditional importance to consensus, of reducing the Convention to a minimum level of protection.¹⁵⁰¹ Being aware of such possibility, the Court manages to alleviate the danger of

¹⁵⁰¹ Gerards, 'Judicial Review', 176.

upholding conservative national legislations in the name of the States' margin of appreciation by employing Article 14 as a 'magnifying lens'.

This doctrinal technique ultimately enables the Court to contest and declare discriminatory legislation incompatible with the Convention, without succumbing to the opposite risk of imposing new substantive obligations on the States, beyond their willingness. Hence, the application of Article 14 in its reinterpreted scope serves as a tool for balancing the two opposing and yet complimentary needs of ensuring the effectiveness of human rights, while acting with caution and achieving jurisprudential progress only through minimal and incremental steps, not to undermine States' confidence in the Strasbourg machinery. Translated into terms that are closer to the current investigation, the employment of Article 14 as a magnifying lens has allowed the Court to subtly affirm a new definition of fatherhood, even in the absence of a clear consensus among the legislation of Contracting States. In other words, whenever relied on, the reinterpreted scope of Article 14 has enabled the Court to update the conventional paradigm of fatherhood.

More specifically, while waiting for a consensus to be established in the field of parental leave, in the case of *Weller*, the magnifying effect of Article 14 triggered the Court's departure from a definition of fathers as mere breadwinners. In the cases of *Salgueiro, E.B.* and *X and Others* (concerning the applicants' comparison with heterosexual unmarried couples), the employment of Article 14 as a magnifying lens led to ruling out heterosexuality as a relevant factor when determining whether an individual or a same-sex couple shall be granted parental rights or the authorisation to adopt. Similarly, in the case of *Sahin*, the use of discrimination as an aggravating factor helped overcome the requirement of marriage as a determining factor in the allocation of contact rights and, accordingly, proposed a more nuanced conception of marital fatherhood, according which the (past) existence of a stable and committed (not formalised) relationship between the parents suffices. However, this remains valid only within the context of heterosexuality. Indeed, the Court has not yet showed a willingness to take advantage of the doctrinal development concerning Article 14, when same-sex couples are discriminated against if compared to married couples.

Finally, in light of the above, it is not surprising to identify a significant convergence between the Court's jurisprudence and national approaches. In the field of parental leave, the Court not only abstains from imposing new conditions, but it seems to even lag behind national standards. Indeed, to date, the Court has not yet considered the right to parental leave as protected by Article

8 taken alone or affirmed States' positive obligation to provide for parental leave allowance (although mentioned in the partly concurring/partly dissenting opinion of Judge Pinto de Albuquerque in *Markin*). Rather, the right to parental leave has thus far been accorded protection only by virtue of the magnifying effect of Article 14 and, therefore, only when the more specific issue of discrimination is in question.

There is only one case, where the Court does not, at least *prima facie*, appear cautious to depart from national trends. In *Paradiso and Campanelli*, the Court's interpretation of the child's best interests as unconnected from biological parentage is particularly progressive, if placed within the context of inter-country surrogacy. Indeed, those States that allow surrogacy tend to only recognise the parent who has a biological connection with the child as the child's legal parent – echoing the Court's approach in the cases of *Mennesson* and *Labassee*. However, as expressly acknowledged by the Court, the core issue upon which the judgment in *Paradiso and Campanelli* focuses was the child's removal and placement under guardianship, rather than surrogacy.¹⁵⁰² As such, it remains difficult to interpret this judgment as the Court's attempt to impose new legal conditions on Contracting States, in the field of surrogacy.

4. Does the Court properly take into account all affected parties when shaping its jurisprudence?

The Court tends to adopt a minimalist approach, which manifests itself in at least three distinct ways. Firstly, it seems unwilling to acknowledge the existence of tension between the various individuals involved, unless it is inevitable – like in the case of *Evans v UK*. Secondly, the Court tends to focus exclusively on the arguments brought by the applicants (mostly, fathers) and, more generally, on the interests of the applicants, thus ignoring the implications of its own decision on other potentially affected parties (essentially mothers, children and prospective adoptive parents). This pattern becomes particularly visible in the case-law involving unmarried fathers. The Court does not consider either the reasons advanced by the child's mother for opposing the father's request (not even in *Lebbink*, where the mother had complained of the father's violent behaviour against the child) or the possible impact on the interests of the mother when granting contact or joint residence rights to the applicant. Similarly, in those cases where the applicant contests the

¹⁵⁰² European Court of Human Rights, *Questions and Answers on the Paradiso and Campanelli v Italy judgment*, online at http://echr.coe.int/Documents/Press_Q_A_Paradiso_and_Campanelli_ENG.pdf (last access on 5 July 2015).

placement of the child for adoption without his knowledge and consent, no reference is made to the interests of the (prospective) adoptive parents to continue living with the child. The judgment in the case of *Söderbäck* seems to constitute an exception, as the Court directs explicit attention to the strong bonds existing between the child and her mother's husband. However, it remains unclear the extent to which the prospective adoptive father's interests are attached autonomous weight or, rather, are taken into account by virtue of their coincidence with the child's best interests.

Thirdly, even when both parents jointly lodge the application, the Court implicitly identifies the father as a primary applicant and the mother is subsumed by the father's application. As a result, even if the mother is an applicant, her claims are considered only in as much as her position aligns with that of the father. This explains why, in the case of *Mennesson*, the mother's interests were left out in the cold. Although sharing the father's same claim to be recognised as the child's legal parent, she could not benefit from the Court's finding of a violation of Article 8 with respect to the children's private life because, different from the father, she was not biologically linked to the child. One exception is represented by the judgment in the case of *Markin*, where the adoption of an anti-stereotyping approach enabled the Court to become aware and expose the double-harm of the man-breadwinner/woman-homemaker stereotype on both men and women. Thus, although the mother was not an applicant, the Court went exceptionally far as to spell out the implications of denying fathers the right to parental leave, while available to women, on women's professional ambitions. Nonetheless, it missed the opportunity to draw a link between military servicemen's exclusion from parental leave policies and the double-shift of women.

Moreover, although approaching the case from the perspective of women's gender equality, the Court failed to consider parental leave as a tool that benefits not only parents, but also children.¹⁵⁰³ A similar adult-centric vision of family life, which leaves children's experiences outside legal disputes, underlies the judgments in *Salgueiro* and *Gas and Dubois*. While in *Salgueiro* the missed reference to the child's interests did not alter the outcome of the case, in *Gas and Dubois*, the majority's exclusive focus on the personal situations of the adult applicants led to a result, which totally disregards the well-known advantages of providing legal recognition of the child's social ties with his second (social) parent on the basis of the child's wellbeing.

¹⁵⁰³ The Court also missed this opportunity in the case of *Hulea v Romania*, where the applicant had exactly complained that the denial of the right to parental leave to fathers harmed the child's interests in early-age childcare.

In addition to being disregarded, the child's interests have sometimes been subsumed within the claims of the parents. This 'swallowing up' effect is visible in the case of *X, Y and Z*. As argued by the concurring Judge Pettiti, the text of the judgment seems to be excessively grounded on the personal claims of X and Y alone and, therefore, disregards the potential conflict between the couple's demands and the child's right to know his origins.¹⁵⁰⁴ Similarly, in the case of *Sahin*, the Court accepts the assessment of the child's best interests conducted by national authorities by virtue of their closer contact to the parties involved.¹⁵⁰⁵ As argued before, this deferential attitude might have given space to the stereotypical belief that contact against the will of the mother of a child born out of wedlock runs counter the child's best interests; therefore, an overlap between the child's interests and the mother's opposition to contact could possibly be assumed.

Even if considered in isolation, the extent to which the child's position is effectively taken into account depends on the interpretation of the principle of the child's best interests adopted by the Court. As explained in Chapter 1, the deliberately vague nature of this principle entails the risk of subjective – as opposed to objective, fact-based – interpretations and, consequently, might be used as a pretext for reaffirming conventional ideologies on parenting. As a result, the fact that the child's best interests have been consistently declared weighty or even paramount in settling disputes, where the situation of children is at stake, does not necessarily signify that children's real interests have been taken into consideration by the Court, when shaping its jurisprudence. For the latter to be stated, it is necessary to investigate to what extent the determination of the child's best interests undertaken by the Court is based on the specific circumstances of the case and, more specifically, of the child or, rather, gives voice to the traditional ideology of the family and conventional understandings of fatherhood.

While, as previously noted, the Court's jurisprudence pertaining to family-work reconciliation has systematically ignored the position of children, the case-law in the domain of ART and homo-parenthood tends to feature a rather subjective vision of the child's best interests. In the cases of *Evans* and *Dickson*, although the interests of the unborn child are not explicitly mentioned, they are intended as resonating with that of being raised within a stable dual-parental

¹⁵⁰⁴ *X, Y and Z v UK*, Concurring Opinion of Judge Pettiti.

¹⁵⁰⁵ Indeed, it must be noted that the anti-stereotyping approach undertaken by the Court impacts on the national authorities' assumption of the applicant's lack of interest in his child born out of wedlock, but not on their assessment of the child's best interests.

family and, therefore, remain closely tied to a marital or pseudo-marital conception of fatherhood. In the judgment of *Mennesson and Labassee*, the children's right to respect for private life is considered worthy of protection under Article 8 only with regard to the legal recognition of biological parentage. The Court argued that, given the importance of biological parentage as a component of identity, depriving a child of the legal recognition of his/her biological parentage cannot be considered in the child's best interests.¹⁵⁰⁶ In so doing, the Court advances an interpretation that is strongly informed by a biological understanding of fatherhood. The only exception to this trend is represented by the judgment in *Paradiso Campanelli*. In this case, the Court's deviation from a biological definition of fatherhood occurred exactly in the name of the child's interest not to be removed from his family and, therefore, to preserve *de facto* family ties with his parents, regardless of whether they are biologically related.

The child's interests have been given a subjective and, to a great extent, heteronormative reading, also in the context of homo-parenthood. In the cases of *Fretté* and *E.B.*, the child's best interests were interpreted in accordance with sex role stereotypes in order to establish that, *vis-à-vis* the same evidence, the refusal of the authorisation to adopt on grounds of sexual orientation breaches Article 14, taken in conjunction of Article 8, when the applicant is a lesbian woman, but not a single homosexual man. In other words, the Court seems to be of the opinion that one's personal qualities and aptitude for raising children should be taken into account and considered compatible with the child's best interests when the prospective adopter is a lesbian woman (even in presence of an uncommitted and uninterested partner), but not when the application is lodged by a single homosexual man. In the case of *X and Others*, a violation was found on the ground that the Government had not submitted particularly weighty and convincing evidence to demonstrate that excluding second-parent adoption in same-sex couples, when it is available to heterosexual unmarried families, served to protect the interests of the child.¹⁵⁰⁷ However, since this argument was not raised with respect to married couples, the Court implicitly considers second-parent adoption *a priori* compatible with the child's best interests if the parents are married; and, this is indicative of the Court's endorsement of a vision of the child's interests that is informed by normative and stereotypical assumptions around the appropriate family and best *locus* for parenting.

¹⁵⁰⁶ *Mennesson v France*, para 100.

¹⁵⁰⁷ *X and Others v Austria*, para 151.

On the other hand, when faced with applications brought by unmarried fathers, the Court has generally proposed a more objective assessment of the child's best interests, thus placing emphasis on the specific circumstances of each case. This pattern reaches its peak in terms of visibility in the judgments of *Zaunegger* and *Schneider*, where the Court explicitly refused an interpretation of the child's interests that is grounded on general assumptions, which conceive joint residence against the will of the mother and contact, in the presence of a different legal father, as *a priori* contrary to the child's best interests.¹⁵⁰⁸ The same trend can also be observed in the cases arising from secret placement. Although the Court seems to favour a specific view of the child's best interests, that of being reunited and living with his/her biological parents and, therefore, to reiterate a biological definition of fatherhood, the finding of a violation in the cases of *Görgülü* and *K.A.B.* is not based on a general preference for biological over social parenthood. Rather, the Court's reasoning refers to the applicants' demonstrated interest and commitment to their children, coupled with the national authorities' failure to facilitate the father-child reunification. The Court's reliance on the specific circumstances of the case – as opposed to general assumptions – explains also why granting the adoption of the child to the mother's husband was considered not to violate Mr Söderbäck's right to respect for family life. Rather than assuming that children are better off with their biological parents, the Court places emphasis on the child's concrete ties with her legal father, *vis-à-vis* the limited contact she had with his biological father, and favours the national courts' decision to formalise the child-legal father's relationship through adoption.

Therefore, with the exception of the domain of unmarried fatherhood, the vision of the child's best interests endorsed by the Court remains very much inspired by a conventional construction of fatherhood. This finding has two major implications. Firstly, in line with the account offered by Théry, the principle of the child's best interests is employed as an “alibi for conventional ideologies”,¹⁵⁰⁹ and, more specifically, for the conventional ideology of fatherhood. Secondly, and as a result, children's interests are *de facto* denied adequate consideration. This adds up to the previous remark pointing to the Court's total ignorance of the repercussions of excluding fathers from parental leave schemes on the child's interest in being provided parental care at early age. In light of the broader picture, therefore, it seems possible to conclude that the vision of family

¹⁵⁰⁸ *Zaunegger v Germany*, para 59; *Schneider v Germany*, para 100.

¹⁵⁰⁹ I. Théry, “The Interest of the Child’ and Regulation of Post-Divorce Family’ in C. Smart and S. Sevenhuijsen (eds.), *Child Custody and the Politics of Gender* (Routledge, 1989), 82.

life endorsed by the Court is certainly adult-centric and, more specifically, father-centric in the domains of ART and unmarried fatherhood.

These conclusions confirm the persisting validity of two sets of concerns, widely shared by feminist legal scholars. Firstly, an excessive focus on gender equality between the parents – even when there is no tension between them – might ultimately leave children’s experiences outside of legal disputes and treat them as mere objects of privileges, and not subjects of rights.¹⁵¹⁰ Interestingly, although this critique was specifically raised with respect to post-separation/divorce disputes, within the Strasbourg jurisprudence, it is far more applicable to the other case-law domains. Indeed, while the interests of the children born out of wedlock have been individually assessed, in the rest of the case-law, the Court has tended to view children as the “passive recipients (...) of the process of parenting”,¹⁵¹¹ as opposed to subjects with their own rights and needs and, therefore, to construct child’s interests as a corollary of the horizontal, interparental relationship.

Secondly, redefining fatherhood in isolation is likely to reproduce, rather than challenge existing gendered dynamics of work and parenting, as much as the redefinition of motherhood in line with liberal values has done. As argued by Fineman, the degendering of motherhood according to the ideal of an egalitarian family has done no more than eliminate motherhood as something distinct from fatherhood in the law and, therefore, rhetorically.¹⁵¹² Indeed, in the absence of a concomitant reconsideration of fatherhood and paternal behaviour, gender-neutral norms remain incapable of affecting the gendered operation of society. Similarly, framing fathers’ rights as independent from a positive relationship with mothers and, more generally, outside of a relational framework might entail the risk of reconstituting gender inequalities. Indeed, this might lead to empowering fathers but, at the same time, ignoring existing patterns of care and, thus, denying adequate recognition to mothers’ parental investment.¹⁵¹³

¹⁵¹⁰ C. Smart and B. Neale, “‘It’s My Life Too’ – Children’s Perspectives on Post-Divorce Parenting’ 2000 *Family Law* 163-169.

¹⁵¹¹ A. James, ‘Parents: A Children’s Perspective’ in A. Bainham et al. (eds.), *What is a Parent?* (Hart, 1999), 183.

¹⁵¹² M. Fineman, ‘The Neutered Mother’ 1992 46 *University of Miami Law Review* 659-660.

¹⁵¹³ N. Dowd, ‘From genes, marriage and money to nurture: redefining fatherhood’ (2003-2004) 10 *Cardozo Women’s Law Journal*, 144.

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Human Fertilisation and Embryology Act 2008 (UK)

Law no. 2002-92 of 22 January 2002 related to the access to origins of adopted persons and children in care (France)

Law no. 54/2006 on “provisions relating to parental separation and shared custody of their children” (Italy)

Welfare Reform Act 2009 (UK)

ANNEX – TABLE indicating the conventional features of fatherhood that are abandoned, maintained or revisited, case-by-case

Chapter 2 – ART

	Biology	Marriage	Breadwinning	Heterosexuality/ Heteronormativity
<p><i>X, Y and Z v UK</i> (1997)</p> <p>Issue: Whether the refusal to register a post-operative transsexual as the legal father of child born to his partner by AI breaches Article 8 and Article 14 of both the couple and the child.</p> <p>No violation of Article 8</p> <p>No violation of Article 14</p>	Essential	Reinforcement	N.A.	Reinforcement
<p><i>Evans v UK</i> (2007)</p> <p>Issue: whether requiring the father's consent for the continued storage and implantation of fertilised eggs breaches the woman's right to respect for family life</p> <p>No violation of Article 8</p> <p>No violation of Article 14</p>	Reinforcement	Revisitation	N.A.	N.A.
<p><i>Dickson v UK</i> (2007)</p> <p>Issue: whether the refusal to grant artificial insemination facilities to enable a serving prisoner to father a child violates his and his wife's right to respect for private life</p> <p>Violation of Article 8</p>	Reinforcement	Reinforcement	N.A.	N.A.
<p><i>Mennesson and Labassee v France</i> (2014)</p>	Essential	N.A.	N.A.	N.A.

<p>Issue: whether the refusal to grant legal recognition in France to parent-child relationships that had been legally established in the United States between children born as a result of surrogacy and the intended parents breaches Article 8</p> <p>No violation of the applicants' right to respect for family life (Article 8)</p> <p>Violation of the children's right to respect for their private life (Article 8)</p>				
<p><i>Paradiso and Campanelli v Italy</i> (2015)</p> <p>Issue: whether the removal and placement under guardianship of a child born from surrogacy abroad breaches the intended parents' rights under Article 8</p> <p>Violation of Article 8</p>	Irrelevant	N.A.	N.A.	N.A.

Chapter 3 – Unmarried and divorced fatherhood

	Biology	Marriage	Breadwinning	Heterosexuality/ Heteronormativity
<p><i>Keegan v Ireland</i> (1994)</p> <p>Issue: whether placing a child up for adoption without the consent of his/her biological father violates the latter's right to respect for family life</p> <p>Violation of Article 8</p>	Reinforcement	Revisitation	N.A.	N.A.
<p><i>Söderbäck v Sweden</i> (1998)</p> <p>Issue: whether granting the adoption of a child to the husband's mother without the consent of the biological father violates the latter's right to respect for family life</p>	Departure	Revisitation	N.A.	N.A.

No violation of Article 8				
<i>Sahin v Germany</i> (2003) Issue: whether the inability of father of a child born out of wedlock to obtain contact rights without the mother's consent violates the father's right to respect for family life as well as Article 14 (compared to divorce fathers) No violation of Article 8 Violation of Article 14 taken in conjunction with Article 8	N.A.	Revisitation	N.A.	N.A.
<i>Lebbink v the Netherlands</i> (2004) Issue: see above Violation of Article 8	Insufficient	Revisitation	N.A.	N.A.
<i>Görgülü v Germany</i> (2004) Issue: whether granting the adoption of a child to an adoptive couple without the consent of the biological father violates the latter's right to respect for family life Violation of Article 8	Reinforcement	Revisitation	N.A.	N.A.
<i>Zaunegger v Germany</i> (2009) Issue: whether the inability of father of a child born out of wedlock to obtain joint residence without the mother's consent violates the father's right to respect for family life and amounts to discrimination (on grounds of sex and compared to divorced fathers) Violation of Article 14 taken in conjunction with Article 8	N.A.	Revisitation	N.A.	N.A.
<i>Schneider v Germany</i> (2011)	Irrelevant	Revisitation	N.A.	N.A.

Issue: whether the denial of contact to possible biological father without consideration of child's best interests violates the alleged father's right to respect for family life Violation of Article 8				
<i>K.A.B. v Spain</i> (2012) Issue: whether the placement of a child in a children's home and subsequently in a foster family (after the mother's deportation) without the father's consent violates the applicant's right to respect for private and family life Violation of Article 8	Reinforcement	Revisitation	N.A.	N.A.

Chapter 4 – Family-work Reconciliation

	Biology	Marriage	Breadwinning	Heterosexuality/ Heteronormativity
<i>Petrovic v Austria</i> (1998) Issue: whether the refusal to confer parental leave allowances on servicemen, while available to servicewomen, violates a father's right to respect for family life No violation of Article 8 taken in conjunction with Article 14	N.A.	N.A.	Reinforcement	N.A.
<i>Weller v Hungary</i> (2009) Issue: whether the refusal to pay benefits to a biological father, while available to mothers, adoptive parents and guardians, violates the father's and the children's right to respect for family life, taken in conjunction with Article 14	N.A.	N.A.	Departure	N.A.

Violation of Article 14 taken in conjunction with Article 8				
<i>Konstantin Markin v Russia</i> (2012) Issue: whether the refusal to grant the right to parental leave to servicemen, while available to servicewomen, violates a father's right to respect for family life Violation of Article 14 taken in conjunction with Article 8	N.A.	N.A.	Departure	N.A.

Chapter 5 – Same-sex couples

	Biology	Marriage	Breadwinning	Heterosexuality/ Heteronormativity
<i>Salgueiro v Portugal</i> (1999) Issue: whether the refusal to award parental responsibility on grounds of sexual orientation violates the applicant's right to respect for family life taken alone and in conjunction with Article 14 Violation of Article 8 taken in conjunction with Article 14	N.A.	Reinforcement	N.A.	Departure
<i>Fretté v France</i> (2002) Issue: whether the refusal to grant authorisation to adopt on grounds of sexual orientation violates Article 8 taken in conjunction with Article 14 No violation of Article 8 taken in conjunction with Article 14	N.A.	N.A.	Reinforcement (if compared to <i>E.B.</i>)	Reinforcement
<i>E.B. v France</i> (2008) Issue: whether the refusal to grant authorisation to adopt, on the ground of the applicant's life-style as a lesbian living with another	N.A.	Departure	Reinforcement (if compared to <i>Fretté</i>)	Departure

woman violates Article 14 taken in conjunction with Article 8 Violation of Article 14 taken in conjunction with Article 8				
<i>Gas and Dubois v France</i> (2012) Issue: whether the refusal to grant simple adoption order in favour of the homosexual partner of the child's biological mother, while possible for married couples, violates Article 14 taken in conjunction with Article 8 No violation of Article 14 taken in conjunction with Article 8	N.A.	Reinforcement	NA	Reinforcement
<i>X and Others v Austria</i> (2013) Issue: whether the refusal to grant simple adoption order in favour of the homosexual partner of the child's biological mother, while possible for heterosexual married and unmarried couples, violates Article 14 taken in conjunction with Article 8 Violation of Article 14 taken in conjunction with Article 8, concerning the applicants' comparison with unmarried heterosexual couples No violation of Article 14 taken in conjunction with Article 8, concerning the applicants' comparison with married couples	N.A.	Reinforcement	NA	Reinforcement/ Departure